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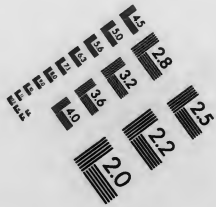
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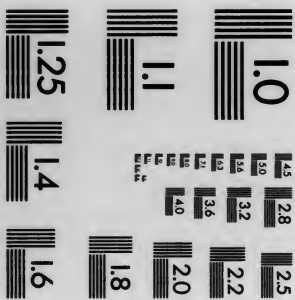
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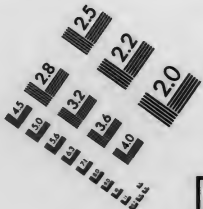
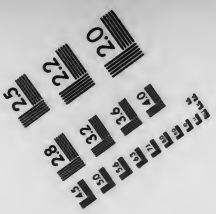
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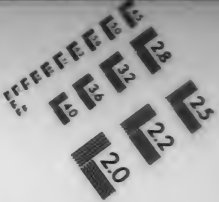
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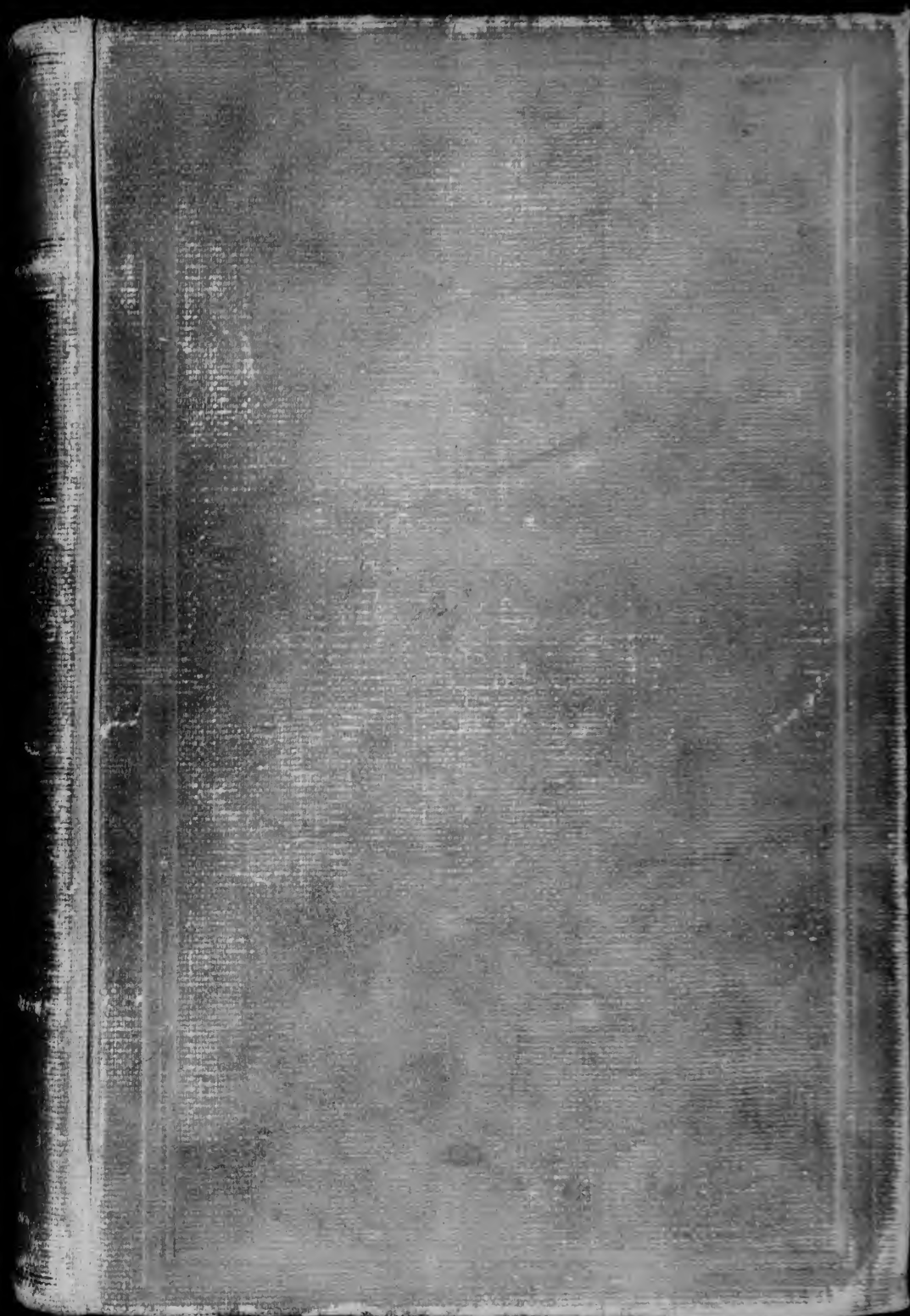


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HANDBOOK

OF THE

LAW OF INSURANCE

By **WILLIAM REYNOLDS VANCE**

PROFESSOR OF LAW IN THE GEORGE WASHINGTON UNIVERSITY
WASHINGTON, D. C.

ST. PAUL, MINN.
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1904

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(V)*

PREFACE.

THIS work, elaborated from the author's lecture notes as they were experimentally developed through several years spent in teaching the law of insurance in Washington and Lee University, is designed primarily for the student, although it is hoped that it may be found useful to the practitioner as well, and possibly contribute something, however little, toward the needed crystallization of this branch of the law from its present amorphous condition. The principal object of the treatise is to give a consistent statement of logically developed principles that underlie all contracts of insurance—erratic doctrines and eccentric decisions being relegated to the foot-notes so far as fairness would permit. Subsidiary chapters are added, treating of the rules peculiar to the several different kinds of insurance, special attention being given to the construction of the standard fire policy.

Since there are more than thirty thousand cases involving questions of insurance to be found in English-printed reports, the citation of cases, upon which much care has been expended, is selective rather than exhaustive. That is, the cases found in the foot-notes are cited for the purpose of supporting, illustrating, or supplementing the statements of the text, and not with any ambition to supplant the digests. For the convenience of both students and teachers, those leading cases which have been selected by the compilers of the various case-books on insurance law as well adapted for illustrative purposes, are printed in capitals. Finally, without invidious mention of names, the author desires to extend in this manner his thanks to the many friends to whose counsel and aid any merit that may be possessed by this book is largely due.

W. R. V.

Washington, D. C., September 10, 1904.

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HANDBOOK OF THE LAW OF INSURANCE.

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HISTORICAL AND INTRODUCTORY.

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THE INSURANCE CONTRACT AND ITS PURPOSE.

1. Insurance is a conditional contract, whereby one party undertakes to indemnify another against loss, damage, or liability arising from some specified but contingent event.
2. The purpose of the contract of insurance is to distribute among all exposed to a common peril loss that, by reason of misfortune, falls upon some of them.

The contract of insurance¹ is to be governed by the same rules that apply to ordinary contracts. While there are many peculiar features that characterize the contract of insurance, it is yet incorrect to regard it as a contract *sui generis*, as seems to be the tendency of some of the courts.² The law of insurance, considered as a

¹ The following definition of "insurance," as given in Bouv. Law Dict. (Rawle's Revision), is adopted in *State v. Pittsburg, O., C. & St. L. R. Co.*, 68 Ohio St. 9, 67 N. E. 93, 96 Am. St. Rep. 635: "A contract whereby, for an agreed premium, one party undertakes to compensate the other for loss on a specified subject by specified perils."

² A distinguished specialist in insurance law recently said, in an address before the American Bar Association: "The contract of insurance is the

separate branch of jurisprudence, is largely made up of the rules determining the proper application of the principles of general contract law to the peculiar conditions under which insurance contracts are usually executed. A thorough understanding of these peculiar conditions is therefore indispensable to the student of insurance law, and that can be obtained only by a consideration of their historical development.

It is to be observed in the outstart that the primary purpose of every contract of insurance is indemnity against some specified loss that is uncertain, either in the happening or in the time when it may occur. The peril insured against must naturally be one to which a considerable number are equally exposed, and yet one which will not be of such frequent occurrence as to make exposure to it wholly fatal to the business to which it is incident. The contract contemplates distributing the loss which, falling upon one, would result in his entire ruin, among all those who are exposed, equally with the unfortunate one, to the same perils. Such an arrangement for the distribution of loss enables a person to calculate with safety the degree of the risk incurred, and make adequate provision for the possible loss, and thus carry on successfully and safely kinds of business, or do acts, that might otherwise bring misfortune upon his affairs and distress to those dependent upon him.³

THE HISTORICAL ORIGIN OF INSURANCE.

3. The origin of the practice of insurance is to be found in the mutual agreements made between merchants, engaged in common shipping adventures, for distributing among the mutual contractors the loss falling upon any one by reason of perils of navigation. It is thus apparent that in its early forms insurance was derived from the maritime law, and as such was a part of the general law merchant, and international in its character.
4. The principle of insurance was probably unknown to the ancient commercial nations, and no reference to the insurance contract is to be found in the books of the civil law.
5. The invention of the practice of insurance is to be attributed to the merchants of the Italian cities in the early Middle Ages. From Italy the practice of insuring commercial ventures against disaster rapidly extended to the other maritime states of Europe.
6. The Lombard merchants who came to London in the thirteenth century brought with them the custom of insuring against hazards of trade. All questions of insurance, however, were

plaything of the legislatures and the football of the courts." See Reports Am. Bar Ass'n, vol. 20, p. 496; 4 Va. Law Reg. 499.

³ For an excellent statement of the benefits flowing from the practice of insurance, and its influence in advancing commerce, see 1 Duer, Ins. p. 54.

determined in accordance with the customs of merchants, and by merchant courts. It was not until the middle of the eighteenth century that the common-law courts began to take adequate cognizance of insurance causes.

Insurance among the Ancients.

It seems remarkable that the merchants who were engaged in the extensive commerce that in ancient times was carried on upon the Mediterranean Sea between the Phœnician and the Levantine cities, and between the several ports of the Roman Empire, should not have invented so simple a method of providing against the hazards that must have attended commercial enterprise at that time as the contract of insurance. Indeed, some means of mutual assistance against the misfortunes to which every merchant engaged in commerce by sea is exposed would seem to have been imperatively necessary for the conduct of such extended commerce as is known to have existed during the period of the Roman emperors. But, with the exception of references to bottomry and respondentia bonds, there are to be found in the Roman treatises no traces⁴ of the contract of insurance. If the practice of insurance was known to the ancient Romans and Phœnicians, the extensive use to which it would probably have been put should have induced some treatment of the rules of law respecting it in the civil-law treatises, but none are found. It is reasonable to presume, therefore, that insurance was unknown either to the Romans or the Phœnicians.

The Earliest Traces of Insurance.

The earliest indications we find of any transactions between merchants similar to insurance are to be found in the laws of the ancient Rhodians.⁵ In this collection of maritime regulations there are provisions for contribution and general average in case of loss by a shipowner, requiring that all of those having an interest in a common venture, and subject to a common peril, shall make contribution to that one whose interest had been sacrificed to protect or save from loss the whole venture. Out of this practice, apparently inaugurated by these Rhodian merchants, there was gradually developed the

⁴ Occasional doubtful references found in the writings of Cicero, Livy, Suetonius, and other Latin authors have led some authorities to conclude that insurance was known and practiced among the Romans. See Emerigon, c. 1, § 1; 1 Duer, Ins. pp. 7, 8. But the better opinion gives other meanings to these passages.

⁵ These laws consisted of a compilation of maritime rules and orders promulgated by Rhodes when that island was the foremost commercial state of the world. They were said to be wise and just, and were adopted by Augustus and subsequent Roman emperors as a part of the Roman law, so far as not repugnant to any of its positive rules. Cicero, *Pro Lege Manilla*. See 1 Duer, Ins. 24.

law of marine insurance, which is thus seen to be the earliest, just as for a long time it was the most important, branch of insurance business.

Insurance as Practiced by the Italian Cities during the Middle Ages.

The first satisfactory evidence that we have of any extensive use of the contract of insurance is to be found in the history and records of the mediæval maritime states of Italy. From the twelfth to the sixteenth centuries the Italian republics of Venice, Florence, and Genoa flourished greatly by reason of their extensive maritime commerce, and it was among these Italian merchants that the contract of insurance first received that attention which the manifest benefits to be derived from its use would justify.* Insurances were certainly effected as early as the beginning of the thirteenth century, and probably in the tenth century. From Italy the custom of making mutual contracts of insurance spread rapidly over the whole of commercial Europe, and early came to be practiced extensively by the merchants in the towns forming the Hanseatic League. As early as 1310 there was a chamber of assurance in Bruges, and there is record of a statutory form of policy in Florence as early as 1520.[†] In fact, the word "policy" is a monument to the Italian origin of insurance, it being derived from the Italian word "polizia."[‡]

Part of the General Law Merchant.

It is thus seen that during the fourteenth and fifteenth centuries the practice among merchants of making insurance contracts had become general throughout all the maritime states of Europe. The contracts seem to have been confined to those merchants engaged in the more extensive international commerce, and this fact rendered necessary uniformity in the regulations of insurance as practiced in these different countries. Thus there was impressed upon these insurance regulations, just as well as upon other commercial rules growing out of the custom of merchants, a certain international character, and the whole body of rules intended to govern these commercial transactions became known as the "law merchant." These rules bore a peculiar relation to the respective systems of law existing in the several countries in which the law merchant, by vir-

* So stated by Pardessus. See opinion of Bradley, J., in *New England Marine Ins. Co. v. Dunham*, 11 Wall. (U. S.) 1, 34, 20 L. Ed. 90, in which is to be found a brief but excellent account of the early history of insurance, and of the sources of insurance law.

† See Richards, *Ins.* p. 6, where this interesting document is set forth in full. This work also contains an excellent outline of the early history and development of insurance.

‡ This appears to have been derived from the Low Latin "politicum," a corrupt form of "polypticum," derived from a Greek word meaning a folded writing. Skeat's Etymological Dict.

tue of the customs of merchants, prevailed. During the Middle Ages these merchants engaged in international commerce, being much more enlightened than most of their countrymen, and better capable of governing their own trade, were naturally unwilling to leave the determining of their rights with respect to such trade to the crude forms of law and the rude courts that administered the local laws of Continental Europe. From this fact arose the custom among these merchants of leaving all questions arising under the law merchant to be settled by conventional courts established by themselves, and having only such powers as were derived from the consent of the parties appearing before them. Nevertheless, these informal tribunals of merchants, who were, in effect, but committees of arbitration, and who had no means of enforcing any order that might be entered, were by the mere force of custom enabled to settle satisfactorily all causes arising out of the law merchant during those centuries. And it was not until the increasing refinement and better education of the people generally had brought the law courts to a higher state of efficiency that these informal mercantile courts were superseded.

The law merchant, of which insurance law is a part, is said to be a part of international law, but it is international only in the sense that the principles applicable are those that are recognized in all civilized nations. The positive rules of law themselves are but part of the municipal law in the several countries in which they are enforced, and do not in any wise affect international relations; that is, the law merchant is a portion of the *jus gentium*, but not of the *jus inter gentes*. On account of its international character as thus understood, the sources from which the rules and customs are to be derived are found in the various compilations of commercial rules and regulations promulgated by the several maritime nations of Europe, and in the treatises by lawyers and merchants in the nature of commentaries on these customs and regulations. While any one body of commercial laws was, of course, binding only upon the courts sitting in the country by which these laws were enacted, yet the similarity of such regulations throughout Europe caused all of these various compilations to be treated as persuasive authority in determining the rule of decision to be applied to any cause that might arise, in whatever jurisdiction.

It will be well to mention a few of the most famous and important of these compilations of commercial laws and usages. The *Consolato del Mare* is the Italian name for a Spanish compilation first published at Barcelona about the middle of the thirteenth century. This body of rules had great vogue in all of the commercial countries of Europe, and has powerfully influenced the subsequent development of maritime and general commercial law in all of the Conti-

nental countries. It contains, however, no distinct reference to insurance law. The Laws of Oleron, a small island off the northwestern coast of France, were first published about the year 1266, and although rather crude, and sometimes harsh, they yet achieved great reputation among merchants, and were regarded as of great weight throughout Europe on all questions involving the law merchant. The Laws of Wisbuy, a flourishing commercial town of Southern Sweden, were published at the end of the thirteenth century, and, on account of the extensive commerce carried on by merchants of Wisbuy, were frequently relied upon for determining maritime rights. In addition to these older sets of laws, all of the Hanse Towns established mercantile codes, governing mercantile transactions in their respective jurisdictions, which were often cited in courts in other parts of Europe. Probably the most skillfully compiled and adequate collection of mercantile regulations was the famous Marine Ordinances of Louis XIV, published in 1681. The excellence of these laws is probably due not only to the sagacity of the great French monarch, Louis XIV, but also to a clear insight into the commercial needs of the day possessed by his illustrious minister, Colbert. The influence of these Ordinances of Louis XIV extended throughout Europe, and even to the British Islands, and afforded the principal source from which Napoleon compiled the famous "Code de Commerce" of a later date, which is now the most important and extensive repository of modern commercial law on the Continent of Europe. In addition to these collections of laws, several earlier treatises obtained great authority in commercial countries, and greatly aided in the proper development of the law merchant. Among these, probably the earliest of importance is the *Guidon de la Mer*, published by Cleirac, a distinguished lawyer of Rouen, in 1671. In later times, a distinguished trio of French writers, Emerigon, Valin, and Pothier, contributed valuable works upon the various subjects of mercantile law. These writers are regarded as of great authority on all questions treated in their works, not only on the Continent, but in England and the United States as well.*

The Introduction of Insurance into England.

Although it is now seen that the law of insurance is but a part of the general law merchant, it has yet become a part of the common law. As said by Bradley, J., in *New England Marine Ins. Company*

* For an appreciative account of these works and writers, see 3 Kent, Comm. 348. That they are still regarded as authorities in general maritime law, see "The Osceola," 189 U. S. 153, 23 Sup. Ct. 433, 47 L. Ed. 760, where the Supreme Court cites the Marine Ordinances of Louis XIV, the Laws of Oleron, of Wisbuy, and of the Hanse Towns. See Appendix to 30 Fed. Cas., where these ancient laws are reprinted in part.

v. Dunham,¹⁰ "the contract of insurance is an exotic in the common law." It will therefore be of interest to trace briefly the early development of insurance law in England, and to note the causes resulting in its adoption into the common law. It seems well established that the Italian merchants coming from the flourishing commercial centers in Northern Italy, and generally known as Lombards, founded trading houses in London in the twelfth century; and it is manifest that they introduced into their English trade the custom of insuring their adventures, which had proved so beneficial to the growth of commerce in their native Italian cities. Lombard street in London is now a monument to these earlier Italian mercantile adventurers, and marks the locality in which their trading houses were located. These Lombards brought with them to London not only their Italian custom of insuring against hazards of trade, but they also brought with them their merchant courts, or, rather, the custom of submitting all contests involving mercantile rights to courts of merchants, established by themselves, and having no relation to or sanction under the common law of England. These merchant courts, which had their analogues in the well-known piepowder courts of the early English fair towns, seem to have been amply adequate to dispose of any litigation that arose among merchants during several centuries, and the preamble to 43 Eliz. c. 12, the first statute passed by the English Parliament that recognizes the practice of insurance, contains a striking tribute to the honesty and fairness which had characterized the dealings of merchants with reference to all contracts of assurance. This fact explains the absence of insurance cases in the earliest English reports, but there is abundant evidence that the business of insurance among English merchants was well established long before the date of this statute, and had attained considerable volume.¹¹ Thus, at the opening of Elizabeth's first Parliament, in 1558, her Chancellor, Lord Bacon, said, "Doth not the wise merchant in every adventure of danger give part to have the rest assured?"

The first reported appearance of any question involving insurance in the common law of England occurred in the thirty-eighth year of the reign of Henry VIII (1546), in the case of *Crane v. Bell*,¹² in which a common-law court issued a writ of prohibition, forbidding a court

¹⁰ 11 Wall. (U. S.) 1, 20 L. Ed. 90.

¹¹ In the preamble to the Statute of 43 Eliz. c. 12, it is said: "And, whereas, it hathe bene, tyme out of mynde, an usage among the merchants, both of this realme and of forraigne nacyons, when they make any great adventure (especiallie in remote parts) to give some Consideracion of money to other persons (which commonlie are in no small number), to have from them assurance," etc.

¹² 4 Coke's Inst. 139.

of admiralty to take jurisdiction of an insurance case. The jurisdiction of causes involving the law of insurance would more properly have fallen to the courts of admiralty, which had cognizance of such causes throughout Europe,¹³ and which have always been more international in their character than any other courts of England. The jurisdiction of admiralty courts in such matters is recognized in the United States,¹⁴ but the jealousy which characterized the common-law courts in maintaining and extending their jurisdiction resulted in the early withdrawal of such causes from the English courts of admiralty, and their transfer to the common-law courts, as was indicated in the case of *Crane v. Bell*, mentioned above. The procedure in the common-law courts, however, and the rigid principles of common-law jurisprudence, were alike ill suited for settling the disputes of merchants in regard to insurance in either an expeditious or a satisfactory way, and the result of prohibition of jurisdiction to the admiralty courts was to continue the practice of submitting such mercantile questions to the arbitration of merchant courts. With the growth, however, of the volume and importance of insurance business, it began to be recognized that some more formal court, with power to enforce its judgments, was necessary for the proper administration of the law merchant. With this in view, there was created by the statute of 43 Eliz. (1601) a special court for the trial of marine insurance cases. This court was composed of the judge of the admiralty, the recorder of London, two doctors of the civil law, two lawyers, and eight grave and discreet merchants. This special court, however, must not have proved itself very efficient, for it seems to have passed out of existence within less than 100 years. It is possible, however, that the passing away of this court was due as much to the increased efficiency of the common-law courts as to the insufficiency of this special mercantile court.

The first reported insurance case heard before a common-law court is *Dowdale's Case*,¹⁵ which was decided in 1589. But so unwilling were the merchants to bring their causes before the common-law courts, that it is said that less than 60 insurance cases are to be found in all of the English reports prior to the time of Lord Mansfield's accession to the bench, in 1756.¹⁶ With the appointment of Lord Mansfield as Chief Justice of the Court of King's Bench there came a new era in the common law with reference to questions involving the law merchant. This great judge, appreciating the peculiar circumstances that attended the making of mercantile con-

¹³ See *New England Marine Ins. Co. v. Dunham*, 11 Wall. (U. S.) 1, 20 L. Ed. 90.

¹⁴ *New England Marine Ins. Co. v. Dunham*, *supra*.

¹⁵ *Coke's Reports*, pt. 6, p. 47b. See *Parke, Ins.* 43 et seq.

¹⁶ See *Parke, Ins.* *ubi supra*.

tracts, and the importance of considering the usages and customs of merchants as determining their rights under such contracts, began a consistent effort to import into the common law such of the principles of the law merchant as would render the common law suitable for the administration of justice in regard to commercial rights. In order to determine what rules should be applied in deciding these causes, he looked to the various authorities that were in vogue on the Continent,¹⁷ such as have been mentioned above, and also had special juries impaneled to determine the customs of English merchants. Thus, in the skillful hands of Lord Mansfield, who is properly called the "Father of English Commercial Law," the essential principles of the law merchant were incorporated into the common-law system of England, and the common-law courts thereby rendered competent to take adequate cognizance of all questions involving insurance. When Mansfield retired from the bench in 1788, not only had the jurisdiction of the common-law courts over questions regarding the law merchant become fixed, but also the volume of litigation in such causes had increased to such an extent as to show that the merchants now regarded those courts as adequate for the administration of justice in connection with their commercial dealings.

THE DEVELOPMENT OF INSURANCE IN ENGLAND.

7. **MARINE INSURANCE**—For several centuries after its introduction into England, insurance was confined to marine risks, and consequently the law of marine insurance was first developed in the English courts, and until recent times remained the pre-eminently important branch of insurance law.
8. **FIRE INSURANCE**—Insurance against loss by fire is of comparatively recent origin, the first regular office being opened in 1681, and assumed little importance before the beginning of the nineteenth century. During the century just closed the growth of the business of fire insurance companies was very rapid, and the law of insurance against fire now rivals that of marine insurance in importance.
9. **LIFE INSURANCE**—Insurance against loss by death is of still later origin, and is of a somewhat different nature from insurance against marine and fire risks. The volume of life insurance business has grown greatly in recent years.
10. **ACCIDENT INSURANCE**—Insurance against accidental injury, including death by accident, is derived from, and in principle is but a form of, life insurance.

¹⁷ As evidence of the international character of maritime law, see the citations in *The Osceola*, 189 U. S. 158, 23 Sup. Ct. 433, 47 L. Ed. 760. A case involving fire insurance has recently been decided in a trial court in Louisville, Ky., on the authority of a French work on insurance, by Alauzet, published in 1843.

Marine Insurance as Developed from the Usages at Lloyd's.

While the practice among merchants of insuring their marine adventures doubtless had its origin as early as the thirteenth century, yet we have no evidence of any definitely settled regulations or methods of carrying on insurance business in London before the latter part of the seventeenth century. It is known that Lloyd's Coffee House, an inn kept by one Edward Lloyd on Tower street in London, was, as early as 1688, a popular resort for seafaring men and merchants engaged in foreign trade. It became the custom among those who gathered at Lloyd's to make their gathering an occasion for arranging their mutual contracts of insurance against the sea perils to which their ventures were exposed. The method employed in making such insurance contracts was for the person desiring the insurance to pass around among the company assembled a slip upon which was written a description of the vessel and its cargo, with the name of the master and the character of his crew, and the voyage contemplated. Those desiring to become insurers of the ventures so described would write beneath the description on this slip their names or initials, and opposite thereto the amount which each was willing to be liable for as insurer. When the total amount of insurance desired by the owner of the vessel was thus underwritten, the contract was complete. From this practice, among those congregating at Lloyd's, is derived the term "underwriters," as now applied to insurers. The business of insurance carried on in this informal way at Lloyd's seems to have increased rapidly, and the commercial importance of the house required that it should be removed to a more commodious and convenient site, which was found on Lombard street, whither Lloyd removed his house in 1692. Both the importance of this coffee house in commercial circles, and the enterprise of its proprietor, were shown by the establishment in 1696 of a newspaper, giving information of commercial transactions and of the movement of shipping throughout the world. While this newspaper was shortly afterwards suppressed by reason of some indiscretion on the part of its publisher, it was yet the progenitor of "Lloyd's Lists," the publication of which was begun in 1726, and which continues up to this day as the most important publication in the shipping and commercial world. After various removals, Lloyd's finally found permanent quarters in the Royal Exchange, where it is now located, and remains, probably the greatest and most important single commercial factor in the mercantile world.

The conduct of the business of marine insurance continued to be largely informal, governed by no fixed rules or regulations, either as to the membership in the company of attending brokers, or as to the terms and incidents of the contracts made, until 1769, when the underwriters accustomed to writing insurance there were formed

into a society governed by rules established in accordance with the customs that had been developed. It soon became evident that many advantages would flow from the establishing of a fixed form of policy which should be used by the contractors at Lloyd's, and, as a consequence, in 1779 the famous "Lloyd's Policy" was adopted as the standard form for marine insurance. The terms of this policy have been subjected to much criticism, and even vituperation, at the hands of writers and courts, Mr. Justice Buller declaring that it was "absurd and incoherent."¹⁸ Yet the uniformity introduced into the business of insurance by its use, and the fact that many of its terms have been construed by the courts, render the venerable document valuable for practical purposes, and justify its retention, with a few needful changes that have since been made, in the modern business of marine insurance. In 1871 the Society of Lloyd's was incorporated, one of the purposes of incorporation being "the collection, publication, and diffusion of intelligence and information with respect to shipping." In carrying out this purpose, Lloyd's and its agencies throughout the civilized world have attained a high degree of efficiency, so that no movement of any considerable vessel, in any part of the world, is made without being promptly reported and published at Lloyd's. In addition to "Lloyd's Lists," before mentioned, the society publishes "Lloyd's Captains' Register," containing information with reference to the character and experience of all the certified masters engaged in British commerce, and "Lloyd's Register of British and Foreign Shipping," published annually, which gives full descriptions of British and foreign vessels engaged in commerce. The symbol used in rating the highest class of wooden vessels in this publication, "A 1," has passed into popular usage as indicating the highest degree of excellence. A record of all casualties occurring during any year is kept in what is known as the "Black Book," and the posting of any vessel at Lloyd's as "missing" is regarded as sufficient evidence of the loss of such vessel to entitle the owner thereof to demand the payment of the insurance.¹⁹

The immense volume and great relative importance of the foreign commerce of England make marine insurance in that country by far the most important branch of the law of insurance, as it was for centuries the only branch.

The Establishment and Development of Fire Insurance.

There is some evidence that even in Saxon times agreements were made in small communities for mutual aid in case of loss by fire,

¹⁸ Brough v. Whitmore, 4 T. R. 206.

¹⁹ See Richards, Ins. p. 11. The brokers at Lloyd's still continue their unique methods of underwriting individually risks proposed, and issuing binding slips, which are followed by formally drawn policies. See Garrett's Insurance Reference Book (1901) p. 233.

but such practice evidently assumed no considerable proportions or importance, and it was not until after the great London Fire of 1666 that fire insurance can be said to have become of any importance as a business. Indeed, no regular office was open for the purpose of insuring against loss by fire until 1681, when certain brokers seem to have formed a loose organization for this purpose in the rear of the Royal Exchange. The year 1710 saw the establishment of the oldest of all fire insurance companies, the Sun Fire Office, which was a mutual and stock company.²⁰ Various other companies were established at later periods, but the business of fire insurance did not attain to any very considerable proportions before the beginning of the nineteenth century. The application of the principles of insurance to losses by fire on land, however much their beneficence might be recognized in the case of marine insurance, did not meet with early favor in England, it being supposed that the tendency of such insurance was to increase the number of cases of arson, and thus make the practice injurious to the best interests of the public. That this belief was not without foundation can be seen from the statistics, which show that, during the years of 1852-66, which period exhibited a marked increase in the volume of fire insurance business, the increase of fires of suspicious origin in England was from 34½ per cent. to 52½ per cent. The business of fire insurance companies, being thus subjected to popular disfavor and suspicion, was deemed a proper subject for taxation, and accordingly the British government imposed taxes, varying in amount from time to time, upon all companies insuring against fire risks down to as late a time as 1869, when it began to be recognized that the business of fire insurance was not only proper, but highly beneficial to the property interests of the country, and the burden of taxation was removed.²¹ During the last quarter of the nineteenth century the business of fire insurance in England increased with great rapidity. Probably the largest fire insurance companies in the world are two great English companies, which have established branches in all civilized countries.

The Origin and Rise of Life Insurance.

The first attempt made to apply the principles of insurance to indemnifying those who suffer on account of the death of others was in 1706, when the "Amicable Society for a Perpetual Assurance Office" was founded. The plan of operation in this society was merely to require from each member, irrespective of age or condi-

²⁰ This venerable company still carries on a large and prosperous business.

²¹ See article "Insurance," 13 Enc. Brit. It is estimated that in the United States over 30 per cent. of the fire insurance losses are to be attributed to fires of intentional origin. See *Fire Insurance and Causes of Fires*, by F. C. Moore, at page 17.

tion, a fixed annual contribution, and, from the sum so raised, to pay to the representatives of each member dying a proportionate part of such sum. In 1734 the society made a guaranty that the amount paid to the representative of each member deceased should not be less than £100. But, even with this latter guaranty, the constitution of this society was not such as to make its operation successful. The first society formed for insuring against loss of life, upon the principles underlying modern life insurance, was the Equitable Assurance Society of London, which was established in 1762. This company first recognized the necessity for varying the amount of premiums paid in accordance with the age and condition of the insurer. Since the establishment of the Equitable, life insurance has been steadily developed along modern lines, and numerous other influential companies have been established in England that carry on an extensive business both at home and abroad.

Accident Insurance.

The first company formed for the purpose of granting indemnity against accidental injury was the Railway Passengers' Assurance Company, established in London in 1849. As its name implies, its business was confined to insurance against railway accidents. But in 1856 it extended the scope of its business so as to include insurance against accidents of all kinds. The contracts of the company, insuring against accidental injury, provided for paying certain sums during disability of the insured on account of accident, or to indemnify him for the accidental loss of any limb or member, or to pay a certain sum to a beneficiary named in case of death by accident. This species of insurance is directly derived from life insurance, and the principles that apply to contracts of the latter kind of insurance in most cases govern the rights of parties under contracts of accident insurance.

THE DEVELOPMENT OF INSURANCE IN THE UNITED STATES.

11. In general, the development of the several kinds of insurance has followed the same lines in the United States as in England, save that marine insurance does not occupy a position of such great importance as compared with fire and life insurance.
12. The peculiar circumstances entering into the making of contracts of insurance, and the early tendency on the part of insurers to make use of the common-law rules governing insurance contracts, in order to take an unfair advantage of the insured, have caused the legislatures of the several states of the Union to enact numerous statutes for the regulation of insurance. These statutory restrictions have greatly complicated the legal principles that are now to be applied to the determining of insurance causes.

Marine Insurance in the United States.

On account of the fact that the foreign commerce of the United States has always been of less importance than its domestic trade, and its shipping relatively insignificant in volume, marine insurance has never attained the great importance in this country that it has always occupied in England. While this is true, yet the volume of business done by marine insurance companies in the United States is by no means inconsiderable. One company, the Atlantic Mutual of New York, carries, perhaps, as great an amount of insurance upon shipping as even the British Lloyd's.²² There is every reason to believe that under the present commercial policy of the United States government, and the rapid growth of American foreign commerce during the last decade, the marine insurance business may in time assume the position of relative importance that it occupies in Great Britain.

Fire Insurance in the United States.

The first fire insurance company to be established in the United States was in Philadelphia, in 1752. This company, known as the "Philadelphia Contributionship for Insuring Houses from Loss by Fire," was incorporated on the mutual plan, Benjamin Franklin being one of its directors. The business of fire insurance has always been favored in the United States, and it has experienced a steady growth, until at the present time it is regarded as thoroughly unwise for any property owner to allow his property to be uninsured. The volume of fire insurance business in this country has become immense, the total amount of risks written by the several joint-stock companies doing business in this country being, during the year 1901, \$20,629,226,087, and the premiums paid, \$157,599,206, while losses were paid amounting to \$93,139,517.²³

The methods of carrying on the business of insurance against fire have been reduced to the greatest precision and nicety. Boards of underwriters are established in the great cities, whose functions are to obtain and classify all items of information, with reference to risks to be assumed, that may be of value to the various constituent

²² This great company during 1891 wrote insurance to the amount of \$718,746,817. During its life of sixty years it has paid losses amounting to \$211,954,046.

²³ Statistics of the business of mutual fire companies are not very reliable. Reports of 179 companies give the premiums received as aggregating \$20,742,603; the losses paid, \$7,324,779.

The average dividend earned by the American joint-stock companies during the period 1860-1901, inclusive, was 11.12 per cent.

The total amount of fire and marine insurance transactions in the United States for the year 1901 is imposing. The total capital invested was \$69,930,423; the total assets of all companies, \$450,566,078; the premiums received were \$199,800,505; and the losses paid, \$112,007,219.

companies. Charts are made of all the buildings in every considerable city, and the underwriter may now, by a mere reference to the chart to be found in his office, determine the quality and character of any risk that may be brought before him. The insurance companies doing business in the cities also maintain salvage corps, who possess every appliance for promptly and efficiently protecting the property of the insured against injury by fire or water, and act on behalf of the insurance companies in conjunction with the fire department of the city in which they are found.

Life Insurance in the United States.

The first effort made to establish life insurance in the United States was a mutual benefit association of Presbyterian ministers which was chartered in 1769 in the colony of Pennsylvania. There seem to have risen numerous small mutual companies of a similar kind during the latter part of the eighteenth and the first part of the nineteenth centuries, but that life insurance was of little importance, and the business of small volume, is evidenced by the fact that the earliest case²⁴ on the subject in a court of last resort was decided in 1809 in the state of Massachusetts. At as late a date as this the court went gravely into the question of whether a contract of life insurance was valid under the law of Massachusetts, it being contended that the common law of England was not in this respect in force in that state, because such a contract was repugnant to sound morals and contrary to public policy. In referring to the holding of the French courts, deciding that such contracts were illegal because they "set a price upon the life of a freeman, which is above all price," Chief Justice Parker naively observed that such reasoning was hardly sufficient, coming from France, where freedom had never been known. Notwithstanding Chief Justice Parker's decided opinion on the subject, the contract of life insurance was long regarded with suspicion, many moralists holding that it was in fact speculating in life, and therefore immoral. In consequence, the growth of the business of life insurance was not rapid until about 1850, when the increasing prosperity of the people of the United States enabled them to give effect to their desire to make a suitable provision after death for the support of those depending upon them. This, with the prevalence of sounder views with regard to the ethics of life insurance, resulted in a very considerable increase in the volume of life insurance prior to the Civil War. After the close of the Civil War, in 1865, life insurance began to grow with marvelous rapidity. Numerous companies were established in all sections of the United States, many of them on very insufficient capital, and their administration was conducted upon very reckless and unsound methods.

²⁴ LORD v. DALL, 12 Mass. 115, 7 Am. Dec. 38.

Many different kinds of policies that were expected to prove attractive to the people were offered, and by the end of the third quarter of the century life insurance had suddenly become one of the most important financial institutions of the country. During the last 25 years the growth of life insurance, while not so marvelous, relatively, as that of the period immediately preceding, has yet been most wonderful, and the volume of business done by life insurance companies at the present time is so great as almost to stagger the intelligence.

The total amount of outstanding insurance of all life companies doing business in the United States was on the 1st day of January, 1902, \$15,574,514,784, and the premiums paid by the people for this insurance \$453,682,070, while the losses paid to policy holders during the year 1901 reached the enormous sum of \$265,231,939.²⁵

In considering the causes of this phenomenal growth of life insurance, it is well to observe that this business is not now confined to mere insurance against the risks and accidents of life, but also includes, as perhaps its most important element, the feature of investment. All life insurance companies now issue policies embodying this feature of investment of money by the insured, with the double purpose of securing protection for those dependent upon him in case of death, and of obtaining a safe investment for his surplus earnings that will yield him a reasonable interest return. These investment policies are of almost infinite variety, and are known variously as "endowment policies" or "endowment bonds." So popular is this investment feature of insurance, that it is now added to the ordinary life policy in nearly all modern companies. Thus the enormous sum total of invested assets of the insurance companies in the United States represents not only the reserve value of the

²⁵ These figures include the business done by assessment associations and fraternal orders, the statistics of which are probably incomplete. It is stated that the total receipts of all the various fraternal orders in the United States during 1901 were \$81,628,597, and the losses paid \$68,412,804, with outstanding insurance of \$5,656,453,465.

From these figures it is apparent that the insurance given by the fraternal orders is much less costly than that of the old-line companies; in the former the losses paid being more than 80 per cent. of premiums received, and in the latter less than 60 per cent.

The volume of life insurance business in the United States may be well illustrated by figures showing the condition of the three greatest life companies on January 1, 1902:

New York Life: Total income, \$71,274,150; total assets, \$290,743,386; outstanding insurance, \$1,365,369,299.

Mutual of New York: Total income, \$65,624,306; total assets, \$352,838,972; outstanding insurance, \$1,241,688,430.

Equitable Life: Total income, \$64,374,606; total assets, \$330,473,309; outstanding insurance, \$1,179,276,725.

outstanding policies accumulated to enable the company to meet losses when occurring, but also represents the savings of great numbers of people who have adopted this form of investment. The favor with which this kind of investment has been met in the United States is probably due to the large proportion of salaried workers in this country, which in turn is due to the fact that nearly all of the industrial enterprises are in the hands of corporations, which necessarily employ agents and servants and pay salaries. These employes, having no business of their own in which their savings can be invested, and, on account of the nature of their business, being usually not in a position to secure for themselves safe and satisfactory modes of investment, are almost perforce led to look to the insurance companies to invest their money for them.

In the subsequent examination that is to be made of the principles which determine the rights of the several parties to such contracts, the student should bear in mind this double nature of the modern life insurance contract: That it is a contract (1) of indemnity to dependents in case of loss of life, and (2) of investment of savings.

Another important factor that has aided in the great increase and popularity of life insurance is to be found in the establishment and growth of the various mutual aid and benefit associations among the laboring classes, these organizations being partly social in their character, and beneficial in purpose.

Accident Insurance.

As was seen above, accident insurance is but a modified form of life insurance, and it might be expected that its importance would increase in much the same proportion as that of life insurance. There are numerous companies insuring against the consequences of accident in all its forms and phases, and the amount of business done by these companies is such as to justify, in a later chapter, a careful examination of any peculiar rules of law that apply in the construction of their contracts.

Statutory Regulations of Insurance Business.

On account of the peculiar characteristics of the insurance contract, and of the extensive use into which it has come, it has afforded a favorite subject for legislation in all of the states of the Union. Notwithstanding the frequency with which such contracts are made by nearly all the members of society, it is safe to say that the principles of no other contract are so little known to even the more intelligent members of the business community as are those of insurance. This unfortunate ignorance of the fundamental principles upon which the conduct of insurance is based has manifested itself in a great mass of legislation, much of which is indiscriminating. Certain hardships bearing upon the insured in the enforcement of

the common-law principles of insurance have been apparent to the unlearned legislator, and have been sufficient to induce him to apply, without regard to the serious consequences that may ensue, such superficial remedies, by sweeping enactments, as may have suggested themselves either to him or to his even less knowing constituents. It is admitted by all persons having any adequate knowledge of the nature of insurance that it is one of the most beneficial inventions of society, and it is peculiarly unfortunate that it should have excited such pernicious activity, on the part of legislative bodies, in the effort to regulate the administration and conduct of companies engaging in insurance. In many cases, however, these legislative regulations have been wisely conceived, and do really remedy deficiencies of the common law, tending to promote justice and prevent the perpetration of fraud upon the public. These statutes are always aimed at the insurer, and intended for the benefit of the insured. In accomplishing this desired end, the statutes may be said to have four general purposes: (1) To insure the solvency of the companies granting insurance; (2) to prevent the insured from being trapped by conditions of forfeiture set forth in the contract that might escape his attention;²⁶ (3) the control of litigation against the insurer, in order to make the remedy of the insured under his contract speedy and efficient; and (4) a general control of the business of the insurers, in order to prevent any unfairness in the administration of their affairs, either to the public or to the policy holders, and for their proper and speedy winding up in case of insolvency.⁽⁵⁾ A fifth general aim to be easily observed is found in the regulations intended for revenue only. The insurance company, with its extensive business and large invested assets, offers a tempting subject for taxation, and this temptation legislatures are by no means inclined to resist. It is probable that the insurance business is taxed more grievously, and bears a larger proportionate share of the burden of maintaining the government, than any other kind of legitimate business.²⁷

The unhealthy influence exerted by the rapid growth of insurance business shortly after the close of the Civil War resulted in the establishing of a large number of unsafe companies, which, after more or less extended struggles for existence, suffered the collapse that might have been expected from their reckless methods. The occurrence of such frequent failures on the part of insurance companies had the double result of entailing very considerable loss upon numerous innocent policy holders, and also of exciting a deep public

²⁶ See the severe arraignment of insurance companies on this account by Doe, J., in *De Lancey v. Insurance Co.*, 52 N. H. 581.

²⁷ See *Elements of Life Insurance*, by M. M. Dawson.

distrust in the integrity of the management of all insurance companies. From this condition the step to government inspection and supervision was a short one. Practically all the states of the Union have passed laws empowering an officer of the state, either specially created for the purpose, and called "Insurance Commissioner," or one of the already existing state officers, to require all insurance companies doing business in their respective states to make annual sworn reports as to the condition of their business, and allowing such officers the privilege of examining the books of the companies at pleasure, and also authorizing them to proceed to wind up any insurance companies which upon inspection are found to be insolvent. Statutes are also to be found in all of the states requiring that each foreign company doing business in the state shall deposit in the state treasury a sufficient sum to secure to the policy holders in that state the performance of all contracts made with them. The funds so deposited in the treasury of the state are required to be a certain per cent. of the capital and assets of the company, and are held subject to a lien in favor of the resident policy holders. In some states companies are not allowed to carry on the business of insurance unless they possess a certain amount of capital specified in the statute, and are prohibited from accepting a single risk exceeding a specified percentage of that capital.²⁸ These regulations, being intended to make certain the solvency of all insurers, and to prevent the reckless and unsound conduct of insurance, commend themselves more highly to reason than any other statutes affecting this subject. And yet statistics show that there are more numerous failures among the extensively regulated companies in the United States than among the British companies, which are almost unmolested.

In the early stages of the business, the conduct of insurance companies towards their policy holders was so illiberal and unwise, and so many real hardships were imposed upon unwary policy holders, that it is not surprising that we find upon the statute books of the various states many laws intended to shield those buying insurance from the supposed wrong intentions and harsh practices of the insurer. However well justified and even beneficial these regulations were at the time they were passed, many of them now operate merely to vex and harass the insurance companies in carrying out the more liberal policies which experience and reflection have shown to be wisest and best. The provisions intended to protect the insured against the consequences of carelessness or ignorance in making the contract of insurance are very great in number and of almost

²⁸ For an example, see Acts Va. 1895-96, p. 452, c. 421. Any attempt to cite accurately the statutes of all the states on these subjects would be useless, and might prove misleading, since they shift like the sands of the sea.

endless variety, and only those most general and important can be noticed. It is a well-recognized rule of law that any contractor accepting an instrument known to contain the terms of his contract is conclusively bound by all of the terms written therein; yet such was the character of the policies formerly issued by insurance companies that, on account of their great length, fine type, long lines, and involved statement, the ordinary contractor found it not only exceedingly inconvenient and burdensome to read over the verbose stipulations, but also, when read, they were practically meaningless to him, unless he chanced to be a man of unusual intellectual powers and legal attainments. The result was that upon the happening of the contingency insured against the policy holder frequently learned for the first time that all rights under the policy had been forfeited by reason of "some condition crouched unseen in the jungle of printed matter with which a modern policy is overgrown."²⁹ In order to prevent such forfeitures, which were regarded with the utmost disfavor by the public, statutes have been passed providing that no condition in the application or other paper referred to in the policy shall be valid unless set forth in the policy itself;³⁰ that no condition or term in a policy shall be enforceable unless printed in type as large as long primer³¹ or other specified size. In some states it is enacted that the insurer may avail himself of no charter or statute stipulation unless it be printed on the policy, although, of course, the failure so to print such a provision on the policy will not prevent the insured from claiming any right given thereby.³² In many states it is enacted that no policy shall be forfeited by reason of a failure to pay any premium or other dues, unless the insurer shall give reasonable notice of the fact that such payment is due. New York, followed by some other states, has even gone so far as to enact that after the third year a life policy may not be forfeited by failure to pay any premium or dues, but that the reserved value of the policy at the time of such failure shall be used in extending the insurance.³³

The rule of law absolutely avoiding insurance policies in the event of a breach of warranty, however immaterial such warranty might be, has often worked great hardship upon careless policy holders, and as a result of this fact a large number of the states have enacted

²⁹ VAN SCHOICK v. INSURANCE CO., 68 N. Y. 434; Richards' Cases, 362.

³⁰ See the Pennsylvania Statute (Laws 1881, p. 20), set out in RITTER v. INSURANCE CO., 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693.

³¹ See Code Va. 1887, § 3252. There exists a legal presumption that the policy conforms to the requirements of the statute. Sulphur Mines Co. v. Phenix Ins. Co., 94 Va. 355, 26 S. E. 856.

³² See Cline v. Assurance Co., 101 Va. 496, 44 S. E. 700.

³³ See 3 Rev. St. (8th Ed.) p. 1688.

statutes declaring that no policy shall be forfeited by reason of a breach of warranty, unless the fact warranted was material or the statement fraudulent.³⁴ In Missouri it has been enacted that a breach of warranty shall not avoid a policy, unless the subject of the warranty contributed to the happening of the event upon which the policy became payable.

The same general purpose of guarding the insured against unfair advantages that may be taken by the insurer under the terms of the policy that he himself has written is subserved by a statute, to be found in many states, declaring that the agent who solicits the insurance and takes the application shall be deemed the agent of the insurer, and not of the insured, in spite of what the policy may provide;³⁵ that the insurer shall be estopped to claim a forfeiture by reason of a false statement made by the insured, when such falsity was known to the agent of the insurer; prohibiting the insurer from setting up the suicide of the insured in defense of a claim under the policy,³⁶ or from showing, in the case of a fire policy, that the real value of the property destroyed was less than the amount set forth on the face of the policy. Statutes containing this last provision, known as "the valued policy" acts, are the most vicious and short-sighted of all the unwise legislation devised for the regulation of insurance business. They are not only based upon a total misconception and perversion of the true principles of insurance, but are also contrary to public policy, inasmuch as they tend to encourage arson and other fraudulent practices, and, moreover, are opposed to the real interest of those who desire to insure their property. The purpose of insurance is indemnity, and indemnity only, and, whenever it is applied to any other purpose, such use is a perversion of the true principle, and introduces a wrongful and immoral element of speculation that promotes fraud and crime. If a person, by fraudulent collusion with an agent of the insurer, or by deceiving such agent, procures insurance upon his property greater than its value, he is under constant temptation to destroy his own property, and this temptation, which is all too frequently yielded to, not only is injurious to public morals, but greatly increases the average per cent. of loss in property insured, and necessarily results in the increasing of rates of insurance. Thus the inevitable result of such laws, whereunder a fire may cause not a loss, but operate as a means of a most

³⁴ See Union Cent. Life Ins. Co. v. Pollard, 94 Va. 146, 26 S. E. 421, 36 L. R. A. 271, 64 Am. St. Rep. 715.

³⁵ See Continental Life Ins. Co. v. Chamberlain, 132 U. S. 304, 10 Sup. Ct. 87, 33 L. Ed. 341; Bankers' Life Ins. Co. v. Robbins, 55 Neb. 117, 75 N. W. 585. See, also, Acts Va. 1887, p. 349, c. 271, § 5.

³⁶ See the Missouri Statute set out in Knights Templars' & Masons' Life Indemnity Co. v. Jarman, 187 U. S. 197, 23 Sup. Ct. 108, 47 L. Ed. 139.

satisfactory cash sale of the property destroyed, is to shift upon the honest policy holders the burden of paying to the dishonest destroyer of his overinsured property the dishonest gains obtained by such overinsurance. It is thus seen that every consideration of public policy and the best interests of the insuring public should prevent the enactment of these valued policy statutes, yet so great is the prejudice in the mind of the ordinary legislator against any defense that may be made by an insurance company against payment under its policy that probably one-half of the states of the Union have passed such injurious acts.³⁷

In addition to these general acts looking to governmental supervision and control, referred to above, there are many others of a more desultory character that are found in the various states, limiting the powers of insurers or imposing conditions upon their business. Thus, there are found acts regulating the right retained by all companies of canceling fire policies, and still others that establish certain rules with regard to notice and proof of loss in case of fire policies, with which the terms of the policies themselves are required to comply. In New York, and many other states where the valued policy acts are not in force, the insurance company is required by statute, in case the value of the property in the event of loss is found to be less than the face of the policy, to return such proportion of the premium received as was in excess of the real risk borne. In an effort to prevent unfair discriminations among those taking policies, some of the states have enacted arbitrary prohibitions against any discriminations in favor of any individuals of the same class, either in regard to premiums charged, dividends paid, or rebates given; others forbid discriminations between white persons and colored persons. The anti-trust crusades of recent years have also had their effect upon insurance regulations, and we find statutes in a large number of the states prohibiting insurance companies or their agents from combining together to fix the rates of insurance, or making any other agreements that would tend to restrain competition among companies bidding for insurance. These laws have often worked great injustice and hardship upon insurance companies, and have in some cases resulted in causing some of the best companies to withdraw entirely from the state attempting to enforce such vexatious regulations. This withdrawal from the state, of course, removes the better class of insurance companies, thus leaving the business to inferior companies, and making it easy for them to raise the rates. Thus, it is probable that these anti-compact laws

³⁷ The Supreme Court appears to consider such statutes not to be opposed to a sound public policy. See *Orient Ins. Co. v. Daggs*, 172 U. S. 537, 19 Sup. Ct. 281, 43 L. Ed. 552.

tend rather to increase the evil against which they are aimed—that is, higher insurance rates—than to diminish them.

Many states have also manifested a strong desire to retain control of all litigation in connection with insurance contracts, and, as a consequence, we find that one of the conditions upon which foreign companies are allowed to do business in such states is that they shall agree not to remove any causes in which they may be parties defendant into the federal courts. Such agreements, of course, are unenforceable, and cannot operate to oust the jurisdiction of the federal courts, or to deprive the insurance companies of the right to remove their causes if they so desire;³⁸ but it has also been held that the failure of any insurance company to abide by its agreement to allow all litigation to remain in the state courts is sufficient ground for a revocation of the license granted to the foreign insurance company to do business in the state.³⁹ So, as a result of this provision, foreign insurance companies are obliged either to forego their constitutional right to have suits against them tried in the federal courts, or to be deprived of the privilege of doing business in the state.

In the further attempt to control insurance litigation, many states have declared that any term in the insurance contract which limits the time within which suit may be brought upon the policy to a period less than the statutory limitations shall be void. The unfortunate insurance companies are further harassed by additional restrictions and limitations that grow out of various retaliatory acts. Thus, some states have enacted that any foreign corporation carrying on the business of insurance within their limits shall be subject, in addition to the specific requirements of their own statutes, to such additional limitations as may be imposed by the state of the domicile of the corporation upon foreign companies doing business there. We may further mention statutes that require the use of the standard fire policy, which are eminently wise, and can hardly be objected to by any straightforward insurer.

Just in the proportion that regular insurance companies are unpopular and considered proper subjects for all sorts of vexatious regulations that certainly tend to discourage the business, so the various mutual co-operative and benevolent societies that are organized for the double purpose of social satisfaction and financial insurance are regarded with peculiar favor, and every effort is made to encourage them and foster their growth. It will be found that in most states such benefit societies, even though doing insurance business, are exempted from the operation of the regulations imposed upon the general companies as set forth above.

³⁸ *Home Ins. Co. of New York v. Morse*, 20 Wall. (U. S.) 450, 22 L. Ed. 367.

³⁹ *Doyle v. Insurance Co.*, 94 U. S. 535, 24 L. Ed. 148.

**THE EXTENSION OF THE PRINCIPLES OF INSURANCE IN
MODERN TIMES.**

13. The rapid growth and successful conduct of the regular forms of marine, fire, life, and accident insurance have in recent years stimulated the attempts to apply the principles of insurance to contracts of indemnity for numerous other kinds of loss happening under conditions making insurance practicable. These attempts have resulted in a more or less successful extension of insurance to almost innumerable conditions, among which may be noted as the most important:
- (a) Workingmen's or industrial insurance against the peculiar and extrahazardous risks assumed by employes in the various kinds of industries.
 - (b) Guaranty insurance, by which the insurer agrees to indemnify the insured against loss or liability by reason of the lack of fidelity on the part of officials, or liability incurred by reason of default of any other person.
 - (c) Indemnity to employers against liability that may be incurred by reason of personal injury suffered by employes.
 - (d) Insurance against losses suffered on account of violence of natural agencies, such as wind, hail, flood, lightning, etc.
 - (e) Contracts made by benevolent and fraternal organizations for the purpose of granting indemnity to their members in case of loss by reason of sickness, accident, or death.
 - (f) Some unsuccessful attempts made by European governments to establish insurance under governmental control.

In General.

The beneficial results of properly managed insurance have become so well recognized by all classes of society in recent years that there is manifested a strong tendency to apply these benevolent principles to all conditions that give rise to risk of loss or injury. The forms which the application of insurance principles to these varying conditions takes are almost innumerable, and the nature and character of the risks insured against are even more numerous, yet the principles applying to these manifold contracts of indemnity are in all cases practically the same. There are, however, some features of these differing contracts, which have received the consideration of the courts in many cases that are to be noted hereafter.

The student must observe that there is no reason why a contract of insurance shall not be made in any case where an actual loss may be suffered, and that whatever the contract may be called, or through whatever agencies it may be made, or whatever other incidents it may have associated with it, the agreement is still one of insurance, and subject to the rules of insurance law, if the requisite elements are present.

Workingmen's or Industrial Insurance.

It is manifest that no insurance company could safely grant insurance to those who are engaged in hazardous employments, upon the same rates as are paid by policy holders whose lives are subject to slighter risks. There have therefore sprung up numerous companies who issue special policies upon special premium rates to workmen whose employment subjects them to these peculiar risks. Many of the great railroads of the country have established and are now conducting an extensive system of insurance to their employes against the risk incident to their employment. The railway companies build and equip hospitals, and agree to care for and furnish medical attendance to any employe injured in their service, and to pay certain specified sums to him during the time when he is incapable of working on account of his injury, or to his family in case of his death by accident.⁴⁰ In return, the employe is under obligation to allow the employer to reserve a certain amount from his monthly wages, and he also agrees that the employer shall be released from any common-law liability that may exist by reason of the injury suffered.⁴¹ A most interesting and important phase of workingmen's insurance is to be found in the recent efforts made by the German government to establish a compulsory system among the working classes, having as its object relief to any workingman that may be disabled from earning a livelihood by reason of either accident, injury, sickness, or old age. The first introduction of the interesting experiment of government insurance was made under the act of 1884. Since this initial attempt, many experimental acts have been passed by the German government, extending and elaborating the system, which is now said to be highly efficient, and thoroughly satisfactory to the classes concerned.* These experiments in Europe are being tried

⁴⁰ It is generally held that such relief associations do not carry on "insurance" within the meaning of the term as used in statutes regulating the conduct of insurance business, and that the railways that establish such associations are not acting ultra vires. See *State v. Pittsburg, C., C. & St. L. R. Co.*, 68 Ohio St. 9, 67 N. E. 93, 96 Am. St. Rep. 635; *Ringle v. Railroad Co.*, 164 Pa. 529, 30 Atl. 492, 44 Am. St. Rep. 628.

⁴¹ By the weight of authority such releases are valid. See *Beck v. Railroad Co.*, 62 N. J. Law, 232, 43 Atl. 908, 76 Am. St. Rep. 211; *Chicago, B. & Q. R. Co. v. Curtis*, 51 Neb. 442, 71 N. W. 42, 66 Am. St. Rep. 456; *Clements v. Railway Co.* (1894), App. Cas. 482. Contra, *Miller v. Railroad Co.* (C. C.) 65 Fed. 305. *Pittsburgh, C., C. & St. L. R. Co. v. Montgomery*, 152 Ind. 1, 49 N. E. 582, 71 Am. St. Rep. 301; was decided under a local statute prohibiting such releases.

* The following interesting statement is taken from the *Outlook* for August 13, 1904 (volume 77, p. 870): "The way in which the German government regulates insurance partly accounts for the ability of the working people to bear the burden of military and other taxation which weighs on them so heavily, and in some measure removes the fear of poverty from many thousands for whom no other means of financial assistance would be available, and who

along the same lines as those pursued by the larger corporations spoken of above in this country, and may well be watched by us with great interest, with a view to their extension by corporate employers, and possibly to the ultimate adoption of such insurance as a governmental function.

Guaranty Insurance.

The necessity for insuring the fidelity and integrity of persons placed in positions of trust has long been recognized and accomplished by taking bonds for the faithful performance of duty by such persons, with private sureties thereon. There are now, however, numerous and important companies that have been formed for the purpose of granting insurance against official infidelity. These companies not only furnish bonds for all persons in positions of trust, but also agree to indemnify against loss by reason of the dishonesty of employes, or the insolvency of debtors, or against loss in trade, or from nonpayment of obligations, and against other breaches of contract. Under this general class of contracts fall also those that guaranty title to real estate, which are now frequently made, and have given rise to numerous large and influential title guaranty companies. Other insurances of this same general sort are such as are granted against loss by burglary.

Employers' Insurance against Injury to Employes.

No inconsiderable item of expense connected with the conduct of a large industrial enterprise, having in its employ large numbers of laborers, is made up of the sums that must be paid out to those employes who have suffered injury in the course of their employment, and in some cases such employers deem it advisable to secure insurance against loss by such accidents to their employes, and the companies granting such indemnity carry on a business of very considerable volume.

Insurance against Loss by Reason of Violence of Natural Agencies.

While loss by reason of the violence of the elements is not so frequent as that by fire, yet it is extensive enough to justify the forma-

would otherwise be thrown on charity. The insurance is chiefly against accident, sickness, and infirmity due to old age. The number of working people, of whom over 2,000,000 were women, thus protected in 1902 was 17,582,000, and is now, judging by the present rate of increase, probably in excess of 20,000,000. In 1902 there were 711,330 cases of accident indemnified, and in the present year 663,140 pensions for disability are in force, besides 14,186 pensions for illness and 156,618 pensions for old age. The total income of workmen's insurance funds in 1901 was \$131,648,430, and the total expenses were \$106,043,003 in that year. To the total income the employers contributed 45.20 per cent., the employees 37.64 per cent., and the government 6.43 per cent., while the balance of 10.73 per cent. was derived from interest and earnings. More than \$250,000 per day was paid out that year in benefits to working people."

tion of companies for the purpose of insuring against such loss. The most frequent risks of this character insured against are those from wind, hail, and lightning. It has been decided that destruction by lightning, in the absence of conflagration, is not covered by a policy insuring against loss by fire, but in modern times most fire policies include a clause insuring against destruction by lightning. Contracts somewhat similar to these are granted against the explosion of steam boilers. This last kind of insurance has become of great importance, and the business of a company granting such insurance also usually includes the inspection of the boilers insured at certain specified periods. Contracts granting indemnity against loss by reason of the breaking of plate glass have also become of frequent occurrence.

Insurance by Benevolent and Fraternal Organizations.

Associations of men living in the same community, and under similar conditions, for mutual aid against disaster, as well as for social pleasure, have been known from the earliest times. The guilds in the Middle Ages were well organized, and were administered under carefully drawn regulations. It is probable that even at that early time these voluntary associations may have possessed some of the features resembling mutual insurance, but it is only within the last two decades that these voluntary associations of laboring men have engaged in the practice of insuring their members against sickness, injury, and death, to any considerable extent. The natural gregariousness of laboring men, and the rapid growth in popularity of the trades union, have resulted in the establishing of great numbers of benevolent associations, organized for the double purpose of social pleasure and mutual aid in time of distress. In carrying out this latter purpose a most extensive form of life and accident insurance on the co-operative and mutual assessment plan has grown up. This kind of insurance will be further considered in a later chapter.⁴²

Attempts to Establish Government Insurance against Fire.

As early as the sixteenth century the government of Portugal attempted to promote its commerce by providing certain regulations for insuring all maritime ventures by the government. The premiums, however, that the government required to be paid exceeded those that were demanded by private insurers in other countries at the same time, and this effort on the part of the Portuguese government to carry on governmental insurance seems to have been early abandoned.

Within comparatively recent times the city of Zurich, in Switzerland, attempted to institute a system of municipal insurance on the property

⁴² See post, p. 58. Guaranty, liability, and other special kinds of insurance are discussed in chapter 17, post, p. 590.

of its citizens upon the payment of a specified tax premium. It soon became manifest, however, that so many delicate conditions entered into the fixing of the amount of insurance, and the premiums to be paid for such insurance, that the attempt to carry on successfully the business of fire insurance by employes of the government would necessarily fail. Speculation, favoritism, and incompetency, that might have been expected to characterize the administration of such a complicated governmental business, soon resulted in running the premium rates up far higher than they had been when insurance was in the hands of private individuals. The result was that the city soon gave up this attempt, and no considerable effort has since been made to repeat such an unpromising experiment.⁴³ The insurance of workingmen under government regulation that is now being carried on in Germany may, if continuously successful, perhaps revive these attempts to conduct other branches of insurance by governmental agencies.

THE FORMS AND KINDS OF POLICIES.

14. Policies of insurance are as diverse in form as are the contracts which they embody. In 1779 Lloyd's adopted a standard form of marine policy which, with few changes, remains in practically universal use in the British world. A standard form of fire policy has been adopted by many of the American states, which is in general use throughout the United States.
15. Policies differ according to the character of the contract made. The most important kinds may be classified as follows:
 - (a) As to the amount payable, policies are "valued" or "open."
 - (b) As to duration they are "time" or "voyage" policies.
 - (c) As to the subject-matter of insurance, policies are termed "floating," "running," or "blanket" policies.
 - (d) Life policies are known as "regular life," "tontine," "endowment," and "joint life" policies, and by many other descriptive names.

From what has before been said it is seen that the contracts of modern insurance are so very diverse, both as regards the subject-matter of insurance and the terms of the contracts themselves, that the policies in which these contracts are embodied are of almost infinite variety; yet it early began to be manifest that much needless difficulty and confusion had come into insurance law, especially with regard to the adjustment of losses suffered upon property insured under several policies. Because of this troublesome diversity in the terms of similar policies, an effort was early made to reduce the various contracts of insurance against certain frequently occurring perils, such as loss by marine disaster, to a uniformity in terms. As a result, the insurance brokers of

⁴³ See article "Insurance," in 13 Enc. Brit.

Lloyd's Society in 1779 adopted the curious form of policy which has ever since been known as "Lloyd's Standard Policy," and which, despite its incoherence and uncertainty, has been so frequently construed in all of its important terms by the courts as to remain even to the present time the most satisfactory and generally used form of marine insurance policy.⁴⁴ This policy was intended at first to be used only by the underwriters doing business at Lloyd's, and the contracts under this form were held in special favor for many years by reason of the fact that they were made under the guaranty of accredited members of the society at Lloyd's. But the form came into general use among all marine underwriters in England, and by the Marine Insurance Bill of 1899 this venerable document was recognized as the standard form of marine policy for the British Islands.⁴⁵ In the United States no standard form of marine policy has ever been adopted by legislative enactment.

The Standard Fire Policy.

With the remarkable growth of the business of fire insurance in the latter half of the nineteenth century, the evils consequent upon the great variety of policies issued by different companies covering the same kind of risks became so evident and annoying that an effort was made to secure, by legislative interference, uniformity in the terms of similar contracts of insurance, by whatever insurer made. In establishing such a standard form of fire policy Massachusetts took the lead, under an act first passed in 1873. This act was subsequently amended, and the present standard form exists under an act of 1886. Shortly thereafter New York took steps toward framing a standard form of policy for all contracts of fire insurance made in that state. Under the provisions of the New York statute, the act was to be drafted by a committee from the New York Board of Fire Underwriters, but the work was actually done by that committee collaborating with a committee of the National Board of Fire Underwriters, with the assistance and legal counsel of some of the most distinguished specialists in insurance law at the New York bar. In the construction of this important document, therefore, it is seen that use was made of the best talent and the most extensive experience possessed by those engaged in insurance business, under the guidance of those skilled as counselors in the practice of insurance law. The attempt made by those having charge of this work was not only to give as clear and precise expression as possible to the usual terms of a contract of fire insurance, but also to adapt the terms

⁴⁴ Lord Mansfield in 1812 said of this policy: "This policy of insurance is a very strange instrument, as we all know and feel." See *Le Cheminant v. Pearson*, 4 Taunt. 380.

⁴⁵ See 1 Arn. Ins. (7th Ed.) p. 12 et seq., where this peculiar document is printed in full. There is also given an account of recent statutory changes of Lloyd's policy.

used to the judicial precedents in existence at that time. The New York standard policy, as finally reported by this committee of experts, and adopted by the Legislature in 1886, differs in some respects from the Massachusetts form, but has generally been recognized as an instrument of great merit and value, and has been adopted with various minor changes, by the legislatures of several other states. It has recently been decided in Missouri ⁴⁶ that the promulgation of such a standard form by the properly authorized state officers, and the requirement that all policies subsequently written shall be in such form, is not such a violation of the civil rights of citizens, guaranteed under the fourteenth amendment of the Constitution of the United States, as will justify a court in enjoining such promulgation at the suit of protesting property owners.

This standard form of fire policy is now in general use throughout the United States, and has resulted in greatly simplifying the always vexatious and difficult problem of adjusting losses, and has also done much toward rendering more harmonious the legal precedents fixing the rights of parties under the contract. No effort has yet been made to reduce either life or accident policies to any sort of uniformity, and, on account of the numerous variations of which these contracts are capable, it is hardly probable that any such effort could be made with any considerable success.

The Different Kinds of Policies.

Certain ones of the most frequently occurring contracts of insurance have received names that should become familiar to the reader, in order that subsequent reference to them may be more easily understood. Generally, policies are spoken of as being either "interest" policies or "wager" policies. The first is merely the ordinary valid policy of insurance, based upon a substantial interest in the insurer, while the second is a gambling contract, based upon an event in which the parties have no interest other than the payment of some wager. Such wager policies were probably valid at common law, but now in England, under the act of 19 George II, they are prohibited, and they have in most cases been held wholly invalid in the United States, apart from the statutes prohibiting wagering contracts.⁴⁷

A "valued" policy is one in which a definite valuation is, by the agreement of both parties, put upon the subject-matter of insurance and written in the face of the policy, as, for example, a policy insuring "The Ship Empress, valued at thirty thousand pounds." Such a valuation, in the absence of fraud or mistake, is conclusive upon the parties,

⁴⁶ *Business Men's League v. Waddill*, 143 Mo. 495, 45 S. W. 262, 40 L. R. A. 501.

⁴⁷ *CONNECTICUT MUT. LIFE INS. CO. v. SCHAEFER*, 94 U. S. 457, 460, 24 L. Ed. 251.

and in case of total loss it always furnishes the basis of settlement. An "open" policy is one in which a certain agreed sum is written in the face of the policy, not as the value of the property insured, but as the maximum limit of recovery in case of destruction by the peril insured against, as, for instance, a house insured for \$10,000. In case property insured under such open policy is totally destroyed, the insurer may introduce evidence to show that the property was not really worth \$10,000, but some other less sum. Of course, however, the amount written in the policy is always the limit of recovery, beyond which there is no liability upon the insurer, even for damage actually suffered. As has been heretofore noted, many of the American states have by statute prohibited the insurer from showing, in the absence of fraud, that the value of property destroyed is any less than the amount written in the face of the policy, thus converting all open policies arbitrarily into valued policies.

A "time" policy is one granting insurance from one specified date until another, as, for instance, upon a ship from the 1st day of January, 1901, to the 1st day of January, 1902, or upon a house for a period of five years from July 1, 1900. A "voyage" policy is one that insures a vessel or its cargo during a certain voyage between specified termini, as "At and from London to Melbourne and return." Sometimes a policy is written as both a time and voyage policy, as "At and from Liverpool to Canton, for six months from January 1, 1902." Policies upon goods shipped in a certain named vessel are sometimes called "named" policies.

Blanket Policies.

Ordinarily the subject-matter of insurance must be designated with such particularity as will make its identification certain, yet in some cases the nature of the property insured, or the circumstances of the granting of the insurance, are such as to make it impossible to have such certainty in the subject-matter. Thus, insurance may be carried on a constantly changing stock of goods, or on grain that is being carried to and fro in the harbor on lighters, and under such circumstances these policies are usually known as "floating." Other names, having the same significance and given to the same kind of policies, are "running," "open," and "blanket."⁴⁸

Kinds of Life Policies.

The kinds of life policies are limited in number only by the ingenuity of the actuaries and managers of the numerous competing companies, insuring against loss of life, and only the more important and usual kinds may be mentioned. The oldest and most frequent form, even at

⁴⁸ For an interesting case involving a blanket policy, and the apportionment of loss between blanket and specific policies, see *Schmaelzle v. Insurance Co.*, 75 Conn. 397, 53 Atl. 863, 60 L. R. A. 536, 96 Am. St. Rep. 233.

the present time, is known as the "regular life," under the terms of which the insured is required to pay a certain fixed premium annually throughout life, and the beneficiary is entitled to receive payment under the policy only upon the death of the insured.

Another kind of policy which, from the time of its invention by Lorenzo Tonti, an Italian, in 1650, has always proved exceedingly attractive, is the "tontine." The original tontine contract was for the purpose of securing government loans on advantageous terms from the people, and was based upon a division of the lenders into classes, only the survivors of which were at any given period to participate in the payment of the dividends or principal. This, in its simple form, is seen to be the reverse in many respects of the ordinary contract of life insurance, under which it is to the interest of the insurer that the insured should survive the making of the contract long enough to pay in premiums an amount equal to, or in excess of, the sum received by the beneficiaries under the policy. Under the tontine contract, however, death before the dividend period entirely deprived the decedent, or his nominee, of any benefits from the contract whatever, but the interest of all dying would pass to the survivors, so that the last survivor of any class would receive the dividends that originally accrued to the whole class, and, if the terms of the contract so provided, might also receive the entire principal sum of the loan. A great many of the modern life insurance policies contain tontine features, more or less modified to suit the desires of the insured. Thus, in many endowment policies, it is provided that dividends shall be apportioned to all policies subsisting after a certain period, whether five, ten, or twenty years. Under such contracts, those policies maturing or lapsing prior to the expiration of the dividend period receive no dividends, but those still in force at the end of the tontine period receive the benefit, by way of increased dividends, of the maturing or the cancellation of other policies.

As has been stated heretofore, the modern life insurance contract is as much a contract of investment as of insurance. In the regular life policies defined above, the insurance feature is given prominence, but there are written many and various kinds of life policies in which the investment feature is paramount. Such policies are generally called "endowment policies," and usually provide that the insured shall pay a certain premium annually for a stated period of years. If the insured dies before the end of the endowment period, the beneficiary receives the amount which is agreed to be paid in the policy; but if the insured survives the endowment period, he is entitled at its end to receive the amount written in the face of the policy, with any dividends that may be awarded under the authority of the directors of the company from the surplus receipts of the company. Instead of such cash payment, the insured is given the privilege of receiving a paid-up policy for some specified sum, or of taking the benefit accruing under the matured policy

in various other alternative forms. A "joint life" policy is one under which there is an agreement that the premium shall be paid during the joint lives of the persons insured, the policy maturing and becoming payable upon the death of any one of those jointly insured. A "survivorship" policy is one that is payable upon the death of the survivor of several joint lives.

A policy of "reinsurance" is merely a contract made by one insurer with another, whereby the first reinsures with the second some portion of the risks originally taken by himself. Such contracts of reinsurance are made for the purpose of distributing a risk that is deemed so large that a payment in case of loss would seriously cripple and endanger the prosperity of the original insurer. With the exception of some peculiar incidents to be discussed hereafter, the same rules apply to the making of contracts of reinsurance as to those of original insurance.

PREMIUMS AND RESERVE FUND.

16. In fixing the amount of premium in any given case of marine, fire, or accident insurance, the insurer strikes an equation between the sum to be paid by all of the insured and the amount necessary for the payment of probable losses and probable expenses during a specified term. To do this it is necessary to require that each insured shall pay such a percentage of the amount of his insurance as experience has shown that the probable losses suffered, plus expenses to be incurred, will bear to the total of the outstanding insurance.
17. In cases of "level premium" life insurance, the insurer must equate the present worth of the sum payable under the terms of the policy with the present worth of all the premiums that may be received from the insured during the probable duration of his life, plus the proportionate part of the expense of management.
18. In "assessment" insurance, the premium exacted of the insured is determined by apportioning the actual losses suffered and the expenses incurred in any given term among the surviving insured, due regard being had to the expectancy of life possessed by each one insured. Expectancy of life in any case is determined by reference to accepted mortuary tables.
19. THE RESERVE FUND for any given policy is a sum accumulated from the premiums paid for the purpose of discharging the payment due under the policy upon its maturity. Such reserve is made up of that portion of the annual premiums payable which, with compound interest at a fixed rate per cent., will, at the time the policy is calculated to mature, amount to the sum payable under the policy.
20. THE RESERVE VALUE of the policy at any given time is the sum of all such reserved portions of the premiums paid during its currency, and the aggregate reserve values of all policies outstanding determine the liability of the insurer in reference

to outstanding insurance. Thus, the reserve value of subsisting policies, and not the amount of insurance outstanding, is to be looked to in determining the solvency of the insurer, and the rights of policy holders in cases of insolvency.

21. The "surrender value" of a policy is based upon its reserve value, but is usually fixed at a somewhat lower figure.

The fixing of premiums for the various kinds of insurance is done by the actuaries, and involves the application of difficult and abstruse mathematical principles, as well as the calculation of tabulated probabilities from the most extensive data obtainable. In every case of fixing insurance rates, the real problem is to determine what proportion of the losses that are actually suffered from the perils insured against shall be borne by each of those participating in the benefits of the insurance. The machinery for making this distribution of losses and apportioning the burden is usually supplied by a corporation, whose officers make the proper calculations and attend to the details necessary to render effective the agreement for distribution. In each case it is necessary merely to require from all of those in the class insured against certain perils the payment of such sums as will realize an amount sufficient to pay the losses when they shall happen, and also defray the cost of administration. In marine, fire, and accident insurance, where the contract of insurance appears in its simplest and purest form, the sum to be exacted as premium for insurance during any given term can be easily fixed if it is known what percentage of the total amount of insurance that is granted will be required to be paid in losses. In marine and fire insurance long experience, and careful recordation of property insured and of losses under such insurances, have resulted in the formation of tables which give with considerable accuracy the probable percentage which the losses by any specified peril will bear to the total amount of property insured during any given term. With these tables at hand the insurer has but to fix his premium at the same rate per cent. of the amount of the insurance granted as the probable loss during the period will bear to the total property insured. To this net premium so obtained is added a certain amount of "loading," intended to cover the cost of administration, and to give a surplus from which any losses in excess of those anticipated may be paid. In order to provide against emergencies, such as may arise on account of a great storm at sea, or a great conflagration on land, such as that at Chicago in 1871, marine and fire companies are always careful to provide a safe margin between the amount which experience tables show will probably be needed to meet the losses, and the sum actually realized from premium payments. It should be noted here that in the various kinds of mixed insurance contracts, such as that of insuring boilers against explosion, there are many other considerations that enter into the calculation of the amount of the premium besides the probable amount of loss that would

be suffered. Thus, in the case of boiler insurance, the contract requires that there shall be inspection of the boilers insured at stated periods, and a portion of the premium that is paid is in effect the fee charged for the inspection, and has therefore no proper relation to insurance.

Fixing Premiums in Life Insurance.

The problem of determining what charge shall be made to the insured under the contract of life insurance involves many elements that are not found in the case of fire insurance contracts, and presents many difficulties that do not obtain in the calculation of premiums for pure insurance. It is first to be noted that while the loss insured against in a marine or fire contract or an accident policy may never take place, and in the great majority of instances does not take place, yet the loss that the life insurance contract agrees to indemnify is certain to occur, the only element of contingency being the time at which the loss—that is, the death of the insured—will occur. It is plain that if the contract of life insurance is performed by both parties the sum will certainly become payable at some future time, and it becomes necessary for the insurer to provide from the premiums received a sure means of accumulating a sufficient fund to enable him to make the payment promised under the policy when it shall mature. In order to do this, it is needful for him to be able to calculate with a reasonable degree of certainty upon the number of annual premiums he may expect to receive from a healthy person of a given age who may be insured. Such knowledge is now obtained by the insurer from certain tables, ordinarily known as "mortality tables."

The Several Mortality Tables and Their Origin.

The first attempt made to construct a table showing what proportion of a class of men, taken at a given age, will die in successive years thereafter, was made by John Graunt in 1662, being made up from baptismal and death records kept during a number of years in London. This table was very crude, and was much improved by a similar effort made by Halley in 1693, from data obtained from the death records of the city of Breslau, in Germany.⁴⁹ The first table, however, to present even an approximately accurate result, obtained from a more comprehensive compilation of vital statistics, was that given forth by Johann Süßmilch in 1742. It was on this table that the rates of the venerable Equitable Life Insurance Institution, founded in 1765, were based. In 1815, the more accurate Carlisle Tables were compiled, and, being framed from very much more carefully collected and assimilated statistics, very soon became popular with the insurance companies. In

⁴⁹ For an interesting account of the various mortality tables in use, see *Elements of Life Insurance*, by M. M. Dawson.

later times many other mortuary tables have been constructed, but the Actuaries' Experience Tables, made up from the data obtained from the records of seventeen of the largest English companies, and the American Experience Tables, compiled by Shephard Homans, the famous actuary of the Mutual Life Insurance Company of New York, are generally regarded as being the most accurate in the results tabulated, and now furnish a basis for the calculation of all insurance values in the various states of the Union. New York, Virginia, and many other states use the American Experience Tables, while Massachusetts and other states use the Actuaries' Table. All of these mortuary tables, however, as experience has abundantly shown, are too unfavorable to the insured, and the expectancy of life as shown by them is unquestionably less than the experience of insurance companies has demonstrated to be the actual average duration of lives at the given ages. The three most popular tables do not differ widely in the results obtained, but it is to be observed that in the American Tables the ultimate limit of life is placed at 95 years, while in the Carlisle and Actuaries' Tables the ultimate limit is placed at 100. Actual experience has shown that the ultimate limit of life is greater even than 100, and it necessarily follows that the American Tables, especially, placing the ultimate limit at 95, give too unfavorable results for the more advanced ages. It is admitted by all that these mortuary tables are far from being as accurate as might be obtained, and records are now being made from which it is probable that there will be ultimately compiled some vital statistics that will show with reasonable accuracy what is the expectancy of life at any given age. It is manifest that such a table, if accurate and reliable results are to be reached, must take account of locality, heredity, and of sex, none of which were regarded in the construction of existing tables.

Natural Premiums, Level Premiums, and Assessments.

Whatever may be the form of life insurance, the ultimate problem before the actuaries in determining the premium charge to be made is always the same. The insurer must require of the insured, during his expectancy of life as determined by the experience tables, premiums to such an amount that the present value of the aggregate sum of all the premiums that may be paid from year to year shall equal the present worth of the sum payable under the policy at the time of its calculated maturity. It is plain that as life advances the risk of loss increases, and with the increasing loss would come increasing cost of insuring against the happening of such loss. If life insurance contracts were made from year to year, the insurer agreeing merely to grant insurance against loss in any given year, the insured would be required to pay for such term of insurance only in accordance with the actual risk of loss at his age, such amount, of course, increasing from year to year as

the probability of death during each successive year increased, until finally, when the ultimate limit of life was reached, the cost of insurance against death would approach the amount to be paid at death. The premium that would thus be paid for insurance during any given year, or indeed for a term of years specified, would be in many respects similar to that required for insurance for loss by fire or peril by sea, and is known as a "natural" premium. Natural premium insurance is unquestionably the cheapest method of obtaining pure insurance against loss of life, and many efforts have been made to popularize this form of life insurance. But, as is seen, it contains nothing of the investment feature, and, furthermore, imposes ever increasing burdens upon the insured that fall upon him during the later years of his life, when he is least able to bear them. It is probably this characteristic that has prevented natural premium insurance from attaining any considerable vogue, notwithstanding the ardent efforts made in its behalf by Mr. Homans, the actuary mentioned above.

The demand for insurance at a fixed annual rate, which shall continue the same throughout the currency of the policy, has given rise to the prevailing form of level premium insurance, which is by all means the most popular form that modern contracts of life insurance assume. It will be readily seen that in fixing a level rate for life policies the actuary is confronted with many difficulties that do not exist in the case of natural premium insurance. The actual risk insured against increases rapidly with the increasing age of the insured, and it becomes necessary for the actuary to strike such an average rate as will, after due regard has been paid to the interest earning power of accumulated premiums, yield a sufficient sum to ensure the ability of the insurer to make the payment promised under the policy when death occurs, which, of course, is calculated to take place at the end of the period specified in the experience tables as the expectancy of life possessed by the insured. The premium charge, which will be merely sufficient to discharge at maturity the obligation assumed to the insured under the policy, is termed the "net" premium; but, as has been said, the actuary must add to the net premium so fixed a sufficient amount, denominated "loading," to defray the expenses connected with the administration of the business of the company. The charge thus made, including this loading, is termed the "office" premium. Of course, the method of calculation of both net and office premiums will vary considerably with the terms of each particular contract. Thus, in the case of a twenty-payment life policy, the actuary must take into account the fact that the insurer cannot possibly receive more than twenty payments, and may receive fewer in case of the death of the insured before the lapse of the specified period. In the case of a ten-year endowment policy, the insurer must base his calculation upon the certain maturity of the policy after ten years, and its possible maturity by the death of the

insured before the expiration of that time. In all cases, however, the essential principle upon which the calculation of the premium is based remains the same.

*Assessment Insurance.*⁵⁰

Theoretically, assessment insurance should be the cheapest and most satisfactory form for determining the charge which should fall upon every member of a class of persons insured in return for the indemnity guaranteed. Pure assessment insurance requires that the loss that may be suffered in the case of the death of any person in the class insured shall be met by levying a proportionate assessment upon all of the surviving members of that class, with such additional amount as may be necessary to defray the expenses of administration. It is plain that the charges made for insurance under the assessment plan would thus closely approach the actual cost of the insurance, the method of levying insurance after the loss has accrued eliminating any necessity for calculating probabilities. But in the practical conduct of assessment companies it is found that it is impossible to apply successfully the pure theory, described above, inasmuch as there is no means of insuring the faithful performance by all of the insured of their agreement to pay all assessments levied. Experience shows that the members of such companies will pay the assessment when they deem it to be to their advantage to do so, but otherwise they will not. Consequently it is impossible, in cases where pure assessment insurance is put into practice, to determine beforehand what is going to be the amount realized by any assessment that may be levied. As a result, promises to pay losses are rendered uncertain, and the company is apt to be abandoned by those who do not feel inclined to pay assessments, when uncertain whether the obligation of the company to themselves will be met when it matures. In order to do away with this element of weakness in the conduct of assessment insurance, it is found necessary to secure to the insurer some means of penalizing the members for a failure to pay assessments. This is ordinarily accomplished by requiring that certain dues and fees, somewhat in the nature of the premiums of level premium companies, shall be paid in at stated intervals by the members of the assessment company. The funds so received are used to defray expenses, and also to accumulate a sort of reserve, known as the "emergency fund." In case of the failure on the part of any member to pay any assessment when properly levied, his interest in the reserve fund to which his previous payments have contributed, will be forfeited. In this way assessment insurance associations, which are usually in the form of some fraternal organization, that may include insurance as only one of its purposes, have become very numerous, and

⁵⁰ As to the extent of assessment life insurance in the United States, see North American Review, vol. 151, p. 507.

carry on life insurance extensively, and with considerable success, although, on account of insufficient rates and unbusinesslike management, failures among them have been numerous.

The Meaning and Function of the Reserve Fund.

Under the ordinary level rate life policy, if it is not allowed to lapse by the insured, the sum promised to be paid by the insurer will certainly become due at a future time, which, though uncertain in every individual case, yet in the average may be ascertained with reasonable accuracy from the experience tables. The insurer is obliged to make provision for such payment, and must from the premium received each year set aside or reserve a sufficient amount to enable him to discharge his obligation when it matures. This accumulated fund, which is seen to measure the ability of the insurer to keep his promise for payment, is known as the "reserve fund."⁵¹

⁵¹ The method of determining the amount that must necessarily be reserved in this fund, and its meaning in the contract of insurance as affecting the rights of all the parties thereto, may be best explained by reference to the following table:

Year.	Number of Policies in Force.	Insurance Outstanding.	Premium Receipts.	Total Assets.	Losses Paid.	Reserve Fund.	Reserve Value of Each Policy.
1	10	\$110,000	\$20,000	\$20,000	\$11,000		
2	9	99,000	18,000	27,000	11,000	\$ 9,000	\$1,000
3	8	88,000	16,000	32,000	11,000	16,000	2,000
4	7	77,000	14,000	35,000	11,000	21,000	3,000
5	6	66,000	12,000	36,000	11,000	24,000	4,000
6	5	55,000	10,000	35,000	11,000	25,000	5,000
7	4	44,000	8,000	32,000	11,000	24,000	6,000
8	3	33,000	6,000	27,000	11,000	21,000	7,000
9	2	22,000	4,000	20,000	11,000	16,000	8,000
10	1	11,000	2,000	11,000	11,000	9,000	9,000

In order to show the method of calculation of the reserve fund and its function most clearly, we will take an example which, though impossible in practice, yet fully exhibits principles which in a more complex form apply to the actual contracts as made. Thus, suppose that ten men of uniform age form a class of persons insured. We will suppose that each one carries an insurance of \$11,000, and that all are of such an age that, in accordance with the mortality tables, one may be expected to die each year. It is evident that all will be dead after the tenth year, and that the insurer may expect to receive the first year ten premiums, the next year nine premiums, and so on. From the whole class of ten he will receive fifty-five premiums. To all ten it will be necessary to pay the aggregate sum of \$110,000. Now, disregarding all questions of interest and expense, in order to simplify the illustration, it is apparent that the insurer must raise the sum of \$110,000 from fifty-five premiums. It will therefore be necessary to require that each annual premium paid shall be \$2,000.

By reference to the table, it is seen that at the end of the first year, when

Surrender Values.

Most life policies, especially in later years, stipulate that, if the policy shall be in force for a given number of years, there shall be paid to the insured a certain amount upon his surrendering his policy for cancellation.⁵² The amount of this surrender value offered is based upon the reserve value of the policy at the time of surrender, and it is plain that the insurer can well afford to pay to the insured the entire reserve value of his policy in consideration of his surrendering it for cancellation; but, inasmuch as insurance companies desire to discourage the surrender of policies so far as they can equitably do so, the surrender value fixed upon a policy is usually set at a considerably lower figure than that which would be established by its reserve value. It seems that, in the absence of a specified promise so to do, the insurer is under no obligation to pay any portion of the reserve value of a policy upon its surrender.⁵³

the first payment of \$11,000 must be made, there is outstanding insurance to the amount of \$110,000, and during that year premiums have been paid in to the amount of \$20,000. After the loss of \$11,000 has been paid out of the income for that year, there remains a balance of \$9,000 unexpended. This \$9,000 must be reserved by the insurer to meet losses that will subsequently occur, and constitutes the reserve fund necessary for the outstanding insurance of \$99,000, with which the second year begins. The reserve value of each policy is manifestly found by dividing the total amount of reserve by the number of policies outstanding. Thus, in the example taken, at the beginning of the second year there are nine policies outstanding, with a reserve fund in the hands of the insurer of \$9,000; therefore the reserve value of each policy is \$1,000. In order further to explain the relation of these values, let us note the condition of our supposed company at the end of the sixth year. It is seen that during the sixth year there is outstanding insurance to the amount of \$55,000, but the amount of premiums received is now only \$10,000, whereas the loss occurring that year requires the payment of \$11,000, the loss thus exceeding the premium income. This excess, however, is more than made good by the reserve fund of \$25,000, which has been accumulated, and which, added to the premium received that year, gives \$35,000, from which the \$11,000 of loss for that year must be paid, leaving the reserve fund at \$24,000 at the end of the sixth year. At the beginning of the seventh year there are four policies outstanding, and a reserve fund of \$24,000 has been accumulated. Thus, the reserve value of each policy, at the beginning of the seventh year, is \$6,000. At the beginning of the tenth year there is but one policy outstanding, and a reserve fund of \$9,000 on hand. There is due under this one policy a premium of \$2,000, which, added to the reserve fund of \$9,000, enables the insurer to pay the sum due under the last policy at its maturity at the end of that year. (Illustration adapted from that in Dawson's *Elements of Life Insurance*.)

⁵² In many states statutes require that the reserve value of a lapsed policy shall be applied as a single premium payment in the purchase of paid-up insurance. See the New York statute, set out in full in *Nielsen v. Society*, 139 Cal. 332, 73 Pac. 163, 96 Am. St. Rep. 146.

⁵³ *Haskell v. Society*, 181 Mass. 341, 63 N. E. 899.

Surplus.

As has been explained above, the income received by insurance companies that conduct their business upon a conservative basis, as experience has shown, considerably exceeds the liabilities that become fixed under the policies at their maturity. The liability of the insurer under the policies outstanding is at any time not the face value of those policies, for the liability under them is contingent; but is always determined by reference to such reserve fund as calculated by the experience tables, and at some fixed rate⁵⁴ of compound interest will enable the insurer to discharge all obligations under the policies when those obligations become due. Therefore, the reserve value of all of the outstanding policies is the criterion of the solvency of the insurer. If its assets fall below the amount that should be reserved in order to maintain the reserve fund intact, under the laws of most of the states the insurance commissioner is authorized to take possession of the assets and to take steps to wind up the company for the benefit of its creditors. In winding up such insolvent company each policy holder is deemed to have a fixed claim against the company to the amount of the reserve value of his individual policy. In order to prevent the danger of their assets falling below the amount necessary to maintain their reserve, and thus to insure their solvency, most insurance companies set aside a certain portion of the surplus income above that needed for the payment of losses and the maintenance of the reserve, and place it in a surplus fund, upon which, in case of epidemics or other unusual or unexpected losses, they can draw in order to preserve their reserve funds and avoid insolvency. The residue of the income received is apportioned by the directors under the charter and by-laws as dividends to the several policy holders as their contracts mature. It has recently been decided in New York that policy holders, upon maturity of their contracts, have no rights in the surplus funds set aside for the purpose described above, but can claim to participate in the surplus income of the company only to such an extent as dividends may be apportioned to them by the order of the directors of the company.⁵⁵

⁵⁴ See, for example, Code Va. 1887, § 1278.

⁵⁵ *Greeff v. Society*, 160 N. Y. 19, 54 N. E. 712, 46 L. R. A. 238, 73 Am. St. Rep. 659.

CHAPTER II.

THE NATURE AND REQUISITES OF THE CONTRACT.

- 22-23. The Nature of the Insurance Contract—In General.
 24. An Aleatory but Not a Wagering Contract.
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THE NATURE OF THE INSURANCE CONTRACT—IN GENERAL.

22. Any contract which provides indemnity for contingent loss or damage is a contract of insurance, whatever be its form. Its essential requisite is a risk to be assumed; and, wherever a risk not involving any illegal acts exists, a contract of insurance may be made for the assumption of that risk.
23. The contract, which is ordinarily entire, the whole premium being earned upon the attachment of the risk, covers:
- (a) A loss due to the negligence of the insured.
 - (b) But not a loss intentionally caused by the insured.

As has before been indicated, the insurance contract is characterized by the features possessed by other contracts, and is, under ordinary circumstances, to be construed in accordance with the rules that apply to contracts in general; but there are some additional characteristics possessed by the contract of insurance, that require special rules to be applied by the courts of law in properly determining the rights of parties to them. The primary requisite essential to the existence and validity of every contract of insurance is the presence of a risk of actual loss. The insurer in all cases agrees to assume this risk, in return for a valuable consideration paid to him by the insured. Wherever such an actual risk exists, and that risk is assumed by one of the parties to the contract, whatever be the form which the contract may wear, or the name which it may bear, it is in fact a contract of insurance. The question as to whether any given contract is one of insurance really, or one merely wearing the guise of insurance, becomes important, not only for the purpose of deciding whether the peculiar principles of insurance law are applicable, but also, and most frequently, in order to determine whether the con-

tract is subject to statutory provisions governing insurance business. It has been held repeatedly that the contracts made between the various correlated lodges and chapters of benefit associations with the members of such associations, if they provide for a real indemnity against loss of life, or the consequences of sickness or accident, are contracts of insurance, and are subject to the insurance laws, unless excepted from their operation.¹ So a contract whereby one of the parties agrees to indemnify the other against the losses that may be sustained on account of the insolvency of debtors, inasmuch as it provides for the shifting of an actual risk from one party to another, is a contract of insurance, whatever be its form and name.² Where a newspaper company offers, in each paper issued, to pay a certain amount to the heirs of any person who suffers death by accident within a specified time after its issuance, provided he is found with a copy of that paper upon his person, with the printed offer signed by him, is liable as under a contract of insurance, in case the purchase of the paper was induced by the offer.³ So contracts to pay for the loss of a bicycle,⁴ for damages sustained by an employer by reason of injuries inflicted by his employés in driving his vehicles,⁵ for losses that may be suffered by reason of accident in connection with the running of an elevator, or for injuries that may be suffered by a workman in the employ of a contractor, are contracts of insurance as truly as are those which are written in the regular course of business and in the standard form of policy.⁶

But it is not every contract that wears the appearance of insurance that is really a policy of insurance. Thus, where a corporation provides means of making investments of small sums paid in monthly installments by certain holders of certificates, with the agreement that the certificates shall be redeemed in accordance with certain agreed stipulations, this contract is not one of insurance, even though it may be based upon the ordinary tables used in insurance, and may include some other characteristics of the insurance contract.⁷ When a lightning rod dealer, upon the sale of a lightning rod, agreed to pay all damages resulting to the building from lightning, to which the rod

¹ As to the nature of these organizations, see further, p. 53.

² *Clafin v. Credit System Co.*, 165 Mass. 504, 43 N. E. 293, 52 Am. St. Rep. 528; *Tebbetts v. Guarantee Co.*, 73 Fed. 95, 19 C. C. A. 281; *Shakman v. Credit System Co.*, 92 Wis. 366, 66 N. W. 528, 32 L. R. A. 383, 53 Am. St. Rep. 920.

³ *Commonwealth v. Philadelphia Inquirer* (Com. Pl.) 15 Pa. Co. Ct. R. 463.

⁴ *In re Solebury Mut. Protective Soc.*, 3 Del. Co. R. 139.

⁵ *EMPLOYERS' LIABILITY ASSUR. CORP. v. MERRILL*, 155 Mass. 404, 29 N. E. 529.

⁶ *EMPLOYERS' LIABILITY ASSUR. CORP. v. MERRILL*, 155 Mass. 404, 29 N. E. 529.

⁷ *State v. Federal Inv. Co.*, 48 Minn. 110, 50 N. W. 1028.

was attached, within a specified term, the contract made was held to be one of guaranty, and not of insurance.⁸ But where a corporation, even though it was called a surety company, agreed for a valuable consideration to indemnify the other party against loss by reason of uncollectible debts, this was a contract of insurance, and not a contract of guaranty.⁹ Where a number of young men made a mutual agreement whereby each member, upon the payment of a certain initiation fee and annual dues and assessments, and upon giving a guaranty that he would not be married within two years from the date of his initiation, was to receive one thousand dollars at the time of his marriage, this was held to be a mere gambling contract in restraint of marriage, and not a contract of insurance.¹⁰ It is to be noticed that in all those cases which were held not to be contracts of insurance there was an element of chance, but no assumption of a risk of actual loss.¹¹

It is manifest that the risk of loss must not be so great as to be prohibitory of the enterprise in which it is encountered, and that there must be, in order to the successful practice of insurance, a sufficiently large number exposed to the same risk to make it practicable and advantageous to distribute the loss falling upon a few. This is well expressed in the quaint language of an old writer, who speaks of "this most laudable custom of assurances, whereby the danger and adventure of goods is divided, repaired, or borne by many persons consenting and agreed upon between them what part every man will be contented to assure, make good, and pay if any loss or casualty should happen to the goods adventured, or to be adventured, at the seas as also by land, to the end that merchants might enlarge and augment their trafficke and commerce, and not adventure on in Bottome to their loss and over-throw, but that the same might be repaired and answered for by many."¹²

⁸ *Cole v. Haven* (Iowa) 7 N. W. 383. While the result of this decision is correct, inasmuch as the lightning rod dealer should have been estopped to set up his own violation of the insurance laws, there can be little doubt that the contract in question was really one of insurance.

⁹ *Tebbetts v. Guarantee Co.*, 73 Fed. 95, 19 C. C. A. 281, 38 U. S. App. 481.

¹⁰ *State v. Towle*, 80 Me. 287, 14 Atl. 195.

¹¹ Evidence of the rapid extension of the principle of insurance to all the perils of commerce and life is found in the recent press reports of the establishment of corporations insuring against loss by strikes, and of other corporations guarantying to their members the payment of their burial expenses up to the amount of \$100. Corporations engaged in carrying on such "burial insurance" in New York have recently been enjoined from continuing in business without first complying with the requirements made by the laws of that state for the regulation of insurance business.

¹² Mayhew, *Lex Mercatoria*, Ed. 1622, 146.

Contract an Entirety.

The contract of insurance is an entirety,¹³ and in the absence of a stipulation to the contrary, if the risk is once attached, no portion of the premium is returnable, even though the subject insured may be lost by reason of an excepted peril before the expiration of the term for which the insurance is granted.¹⁴ But unless the risk does attach, the contract fails of its purpose, and the insured may recover the premium paid, upon the ground that the consideration therefor has failed.¹⁵

No Indemnity for Intentional Damage.

The contract does not contemplate granting indemnity for a loss which is due to the intentional act of the insured, for one of the requisites of insurance is that the risk shall not be subject in any wise to the control of the parties. Upon this principle, as well as upon deeper grounds of public policy, the insurer is not required to indemnify the insured for a loss that has been caused by his own criminal act.¹⁶ The insured may not recover for the loss of a building that has been burned by himself,¹⁷ and, in the recent case of *Ritter v. Mutual Life Ins. Co. of New York*,¹⁸ the Supreme Court of the United States has held that not only is suicide of the insured, while sane, a good defense under the ordinary policy, but also that a contract stipulating for payment in case of suicide would be contrary to public policy and void.

Insured's Negligence Covered.

While the insured is not indemnified under the contract for the consequences of his criminal wrong, the same principle is not extended so far as to preclude his right to indemnity when the loss is

¹³ For some purposes it is sometimes held separable. See *infra*, p. 69.

¹⁴ *Tyler v. Fletcher*, Cowp. 666, Richards, Cas. 265. See, also, *Hendricks v. Insurance Co.*, 8 Johns. (N. Y.) 1; *Joshua Hendy Mach. Works v. American Steam Boiler Insurance Co.*, 86 Cal. 248, 24 Pac. 1018, 21 Am. St. Rep. 33.

¹⁵ *Forbes v. Church*, 3 Johns. Cas. (N. Y.) 159; *Insurance Co. v. Pyle*, 44 Ohio St. 19, 4 N. E. 465, 58 Am. Rep. 781.

¹⁶ *RITTER v. INSURANCE CO.*, 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693; *Names v. Insurance Co.*, 95 Iowa, 642, 64 N. W. 628; *Western Horse & Cattle Ins. Co. v. O'Neill*, 21 Neb. 548, 32 N. W. 581. But see *Westchester Fire Ins. Co. v. Foster*, 90 Ill. 121, and *Morris v. Assurance Co.*, 183 Pa. 563, 39 Atl. 52. The policy is not avoided if the insured was insane at the time he destroyed the insured property, or, in the case of a life policy, when he committed suicide. *Karow v. Insurance Co.*, 57 Wis. 56, 15 N. W. 27, 46 Am. Rep. 17; *Van Zandt v. Insurance Co.*, 55 N. Y. 169, 14 Am. Rep. 215; *Grand Lodge v. Wieting*, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123. See post, p. 616.

¹⁷ And the defense may be sustained upon a preponderance of evidence. *Blaeser v. Insurance Co.*, 37 Wis. 31, 19 Am. Rep. 747; *Greenl. Ev.* (16th Ed.) § 81d. See *Commonwealth v. Andrews*, 155 Mass. 68, 23 N. E. 1124.

¹⁸ *RITTER v. MUTUAL LIFE INS. CO. OF NEW YORK*, 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693.

occasioned by his own negligence, provided there is no fraud.¹⁹ It has frequently been held that the doctrine of contributory negligence does not in any way apply to rights under a contract of insurance.²⁰

AN ALEATORY BUT NOT A WAGERING CONTRACT.

24. Insurance is an aleatory but not a wagering contract. It is not a contract of chance, but a contract whereunder some of the rights of the parties are contingent upon chance events.

It is erroneous to regard the contract of insurance as a "contract of chance," in the ordinary meaning of the phrase. In a wagering contract the parties contemplate gain through chance; in a contract of insurance the parties seek to avoid loss by reason of chance. The gambler courts fortune; the insured seeks to avoid misfortune. The contract of gambling tends to increase the inequality of fortune, while the contract of insurance tends to equalize fortune. It is for this reason that insurance is termed an "aleatory" contract, in contradistinction to a "commutative" contract, under the terms of which each of the parties is supposed to give an exact equivalent, either in obligation or performance, to the other; whereas, in insurance each party must take a risk; the insurer that of being compelled, upon the happening of the contingency, to pay the entire sum agreed upon, and the insured that of parting with the amount required as premium, without receiving anything therefor in case the contingency does not happen. It is, however, inaccurate to say that, in case the peril insured against does not arise, the insured receives nothing in return for the payment made. In consideration of his payment of the stipulated premium, he receives what is ordinarily termed "protection," which means nothing more than that he is free to take part in enterprises which would expose him to the given peril, with the assurance that in case loss is suffered he will not be ruined by the event, but that the loss will be shifted by the terms of the contract upon the insurer. That this protection is regarded as a valuable consideration in itself is shown in the decision of that class of cases which hold that premiums paid by infants under contracts of life in-

¹⁹ *Gove v. Insurance Co.*, 48 N. H. 41, 97 Am. Dec. 572, 2 Am. Rep. 168; *Travelers' Ins. Co. v. Randolph*, 78 Fed. 754, 24 C. C. A. 305 (accident policy); *Hutchins v. Ford*, 82 Me. 363, 19 Atl. 832 (marine policy); *Cowan v. Robberds*, 6 Adol. & E. 75; *Sadler v. Dixon*, 8 Mees. & W. 895.

²⁰ *Travelers' Ins. Co. v. Randolph*, 78 Fed. 754, 24 C. C. A. 305; *SCHNEIDER v. INSURANCE CO.*, 24 Wis. 28, 1 Am. Rep. 157; *Providence Life Ins. & Inv. Co. of Chicago v. Martin*, 32 Md. 310. *Contra*, *Morel v. Insurance Co.*, 4 Bush (Ky.) 535; *Scottish Union & Nat. Ins. Co. v. Strain* (Ky.) 70 S. W. 274.

insurance cannot be recovered by them upon disaffirmance of the contract, such contract being regarded as executed to the extent to which protection has been given.²¹

AN EXECUTORY AND CONDITIONAL CONTRACT.

25. The contract of insurance is often executed on one side by the payment of the premium for the entire term of the insurance, remaining executory as to the insurer; or the contract may be executory on both sides. The contract in its very nature is not only executory, but subject to conditions, the principal one of which is the happening of the event insured against. In addition to this main condition, the contract usually includes many other conditions which must be complied with as precedent to the right of the insured to claim benefit under it.

Even in cases of fire insurance contracts for a given term, when the premium has been prepaid for the entire term the contract is to a certain extent executory with reference to both parties. Manifestly the insurer's promise is executory, inasmuch as it is not to be performed except upon condition; and certain duties under the contract remain yet to be performed by the insured, such as giving notice of an increase of risk, or making repairs, or of travel or change of residence or occupation in case of life insurance.

The contract of insurance is one peculiarly subject to conditions, some of which are precedent and others subsequent. The main condition upon which the insurer becomes liable to pay the sum named in the policy is a suspensory condition, but ordinarily termed a "condition precedent." The latter term, however, is scarcely accurate, inasmuch as the obligation of the insurer attaches immediately upon the completion of the contract, and his liability to pay is rather suspended until the happening of the specified contingency. This is certainly the case in life insurance. Perhaps it may be more properly said that the happening of the peril insured against in the case of marine and fire insurance is a condition precedent to the liability of the insurer. There are, however, numerous conditions purely precedent to be found in every contract of insurance; as, for instance, the provision that the policy shall not go into effect until delivery and the payment of the first premium, or that no waiver shall be valid unless indorsed on the policy by certain specified officers. Rights once acquired under the policy may be defeated by conditions subsequent set forth therein; thus, the introduction into a house insured of inflammable substances forbidden by the policy, or making

²¹ *JOHNSON v. INSURANCE CO.*, 56 Minn. 365, 57 N. W. 934, 59 N. W. 992, 26 L. R. A. 187, 45 Am. St. Rep. 473.

repairs upon the building, or its being vacated without the consent of the insurer, or, in the case of life policies, engaging in prohibited hazardous employments, or changing the place of residence, or traveling in prohibited regions, without the consent of the insurer, may entirely defeat the rights of the insured under the policy.

A PERSONAL CONTRACT UBERRIMÆ FIDEL.

26. A contract of insurance is essentially personal, each party having in view the character, credit, and conduct of the other. The contract contemplates the payment of money by one to the other, in order to make good a loss that may be suffered with reference to the interest that may be insured. The subject-matter of the contract is the payment of money, although the subject of the insurance may be property; hence
- (a) The contract of insurance is not attached to nor does it accompany the property which is the subject of the insurance.
 - (b) As a general rule, the rights under a contract of insurance against fire, so long as it remains executory, cannot be assigned by one party without the consent of the other.
27. In making the contract of insurance, good faith requires that each party shall disclose to the other all material facts in his knowledge that may affect the making of the contract, and that in all matters concerning the insurance each shall exercise a high degree of good faith in his dealings with the other.

In ordinary parlance it is said that certain property is insured, or that a life is insured, but this is inaccurate. As a matter of fact, every contract of insurance is between two persons, and contemplates insuring one of them against loss that may be suffered with reference to a certain designated property or life. As was pointed out by Brett, L. J., in the leading English case of *Rayner v. Preston*,²² there is a distinction to be made between the subject-matter of the contract of insurance and the subject-matter of the insurance; the subject-matter of the contract is the payment of money, the subject-matter of the insurance may be property or some other valuable interest. Therefore, when the property which is the subject-matter of insurance is destroyed, there arises simply an obligation on the part of the insurer under the contract to pay money over to the other party to the contract. Hence it follows that there is no necessary legal relation existing between property that may have been lost, and the insurance money received by the owner of that property to indemnify him against that loss. Thus insurance money paid to a mortgagor under a policy taken out by him is not affected by the lien of the

²² *RAYNER v. PRESTON*, L. R. 18 Ch. Div. 1, Richards' Cases, 273.

mortgage, nor is the mortgage debt to be reduced by the amount of the insurance money paid to the mortgagee under a contract of insurance that the mortgagee may have taken out upon the mortgaged premises. Stated broadly, the rule is that the insurance contract does not "run with the land" or other property insured.²³ This is well illustrated in the case of *Rayner v. Preston*, referred to above. In this case the plaintiff had made a binding contract for the purchase of certain real estate owned by the defendant. After the contract had been completed, but before a conveyance had been made, the buildings upon the property were destroyed by fire, and the vendor, still in possession, collected the amount due under the contract of insurance which he had taken out upon the property. The vendee claimed that the money received under the policy of insurance rightfully belonged to him, inasmuch as the equitable interest in the property insured was already in him before the conveyance of the legal title, and that, inasmuch as the real loss suffered was his own, the money paid on account of that loss should be awarded to him. But the court held that the contract of insurance was purely personal between the vendor and the insurer; that it did not run with the land that was sold; and that the vendee, as a stranger to the contract, could take no rights under it.²⁴ The same rule applies with reference to the insurance of personal property.²⁵ In the language of Chancellor King, in *Lynch v. Dalzell*,²⁶ "These policies are not insurances on the specific things mentioned to be insured, nor do such insurances attach on the realty, or in any manner go with the same as incident thereto by any conveyance or assignment, but they are only specific agreements with the person insuring against such loss or damage as they may sustain." This view of the contract is sustained by abundant American authority.²⁷ Thus, where real prop-

²³ *Disbrow v. Jones*, Harr. Ch. (Mich.) 48; *Flanagan v. Insurance Co.*, 25 N. J. Law, 506; *Lett v. Insurance Co.*, 125 N. Y. 82, 25 N. E. 1088; *Mann v. Insurance Co.*, 4 Hill (N. Y.) 187; *QUARLES v. CLAYTON*, 87 Tenn. 308, 10 S. W. 505, 3 L. R. A. 170; *Kase v. Insurance Co.*, 58 N. J. Law, 34, 32 Atl. 1057. See, also, *Wright v. Insurance Co.*, 117 Ga. 499, 43 S. E. 700. For a full discussion of the respective rights of mortgagor and mortgagee with reference to insurance on the mortgaged property, see post, p. 417.

²⁴ The doctrine of *RAYNER v. PRESTON* has been expressly repudiated in this country. *Skinner v. Houghton*, 92 Md. 68, 48 Atl. 85, 84 Am. St. Rep. 485. See, also, *State Mut. Fire Ins. Co. v. Updegraff*, 21 Pa. 513; *Reed v. Lukens*, 44 Pa. 200, 84 Am. Dec. 425. It has no application where the vendee pays the premiums. *Williams v. Lilley*, 67 Conn. 50, 34 Atl. 765, 37 L. R. A. 150.

²⁵ *McDonald v. Black's Adm'r*, 20 Ohio, 185, 55 Am. Dec. 448; *Kortlander v. Elston*, 6 U. S. App. 283, 52 Fed. 180, 2 C. C. A. 657.

²⁶ *LYNCH v. DALZELL*, 4 Bro. Parl. Cas. 432.

²⁷ See *Carpenter v. Insurance Co.*, 16 Pet. (U. S.) 495, 10 L. Ed. 1044; *QUARLES v. CLAYTON*, 87 Tenn. 308, 10 S. W. 505, 3 L. R. A. 170; *King*

erty was insured by the owner, the insurance payable to himself, his executors, administrators, and assigns, it was held that upon the death of the insured the interest in the policy passed to his executor rather than to his heirs.²⁸

It is possible, however, for the parties to frame the contract so as to attach it to the property and give successive owners of the property rights under the contract. Thus, where the insurance is "on account of the owners," or for "whom it may concern," or where the loss is made payable to bearer, the subsequent transferees become, by the terms of the contract, the real parties to the contract of insurance.²⁹ Such contracts, by which the insurance policy is made to pass from owner to owner, are of the nature of successive novations.

Contracts of Fire Insurance not Ordinarily Assignable.

From the fact that the contract of fire insurance is peculiarly personal, the result follows that rights under it, so long as it remains executory, cannot be assigned by one party without the consent of the other.³⁰ The insurer, in estimating the character of the risk that he is to assume under the contract, always takes into consideration the character of the party insured, and also his previous conduct. An insurer is very unwilling to grant insurance to a person who has been a too frequent sufferer from loss by fire, or to one of whose good faith, for any other reason, he may have grounds of suspicion. The insurer may be quite willing to take the risk upon property while in the possession of and owned by a person who will use every effort that diligence and good faith may suggest to preserve the property from loss, when quite unwilling to accept the same risk, on the same terms, in case the possession or ownership should be changed. It follows, therefore, that a person whose property is insured, when selling his property to another person, cannot thrust upon the insurer, as his successor in the contract of insurance, a stranger to the contract in the person of his vendee.³¹ The insurer may consent to the substitution of the vendee for the vendor, in which case there is, of course, a new contract created.³² Nearly all of the contracts of insurance upon property provide for the transfer of such contracts to

v. Preston, 11 La. Ann. 95; Clinton v. Insurance Co., 45 N. Y. 454; Plimpton v. Insurance Co., 43 Vt. 497, 5 Am. Rep. 297. But see note 24, supra.

²⁸ Wyman v. Prosser, 36 Barb. (N. Y.) 368.

²⁹ See Rogers v. Insurance Co., 6 Paige (N. Y.) 583, 588.

³⁰ Kase v. Insurance Co., 58 N. J. Law, 34, 32 Atl. 1057; New England Loan & Trust Co. v. Kenneally, 38 Neb. 895, 57 N. W. 759; White v. Robbins, 21 Minn. 370.

³¹ Nor can the insurer, without the consent of the insured, substitute another in his place. Fisher v. Insurance Co., 69 N. Y. 101.

³² Ellis v. Insurance Co. (C. C.) 32 Fed. 646; CONTINENTAL INS. CO. v. MUNNS, 120 Ind. 30, 22 N. E. 78, 5 L. R. A. 430.

vendees under certain conditions, or, in the absence of such transfer, for a repayment of a proportionate amount of the insurance premium received from the vendor. Of course, this applies only to executory contracts of insurance. After the loss has been suffered, and a right to demand money of the insurer has accrued, the insured may assign such claim as freely as any other money demand.³³

The Highest Degree of Good Faith Required of the Parties to the Contract.

In the earliest forms of the insurance contract—for the assumption of marine risks—the subject of the insurance, whether ship or cargo, was seldom present for inspection, but the contract was necessarily made in a place remote from the property insured. Therefore the insurer, in determining the quality of the risk he was asked to assume, was compelled to rely entirely upon the statements made by the applicant for insurance. This necessarily created a fiduciary relation between the parties, and imposed upon the applicant the duty of making full and free disclosures of all the facts that would in any wise affect the making of the contract. Not only was the applicant required to make full disclosures, but it was also necessary that any statements made by him, and upon which the insurer would rely, should be absolutely true. From such circumstances as these, attending the making of the contract, arose the peculiar rules respecting the making of contracts of insurance, and fixing the doctrines with reference to concealments, representations, and warranties, that are hereafter to be discussed. The rule thus derived, requiring that all material facts should be made known to the insurer, is not based upon the principle of fraud, as it might be easily possible for the insured to fail in his duty of disclosure, with no fraudulent purpose whatever. Thus, in the case of Proudfoot v. Montefiore,³⁴ the agent of the insured shipped a cargo of madder from Smyrna for Liverpool, having notified the principal of the shipment, but failed to telegraph to him the fact that the vessel was subsequently wrecked at the mouth of the harbor, and the cargo lost. The principal, after the destruction of the cargo, and after he might have received the telegraphic information of that fact if the agent had properly performed his duty, secured insurance "lost or not lost" on the venture, but did not, of course, disclose the fact of loss that was not known to him. It was held that the policy was avoided by the failure to disclose the fact that should have been known to the insured, even though in reality he was as ignorant of the fact as was the insurer.

While questions involving the exercise of good faith and the duty

³³ Nease v. Insurance Co., 32 W. Va. 283, 9 S. E. 283. And see post, "Assignments," p. 463.

³⁴ PROUDFOOT v. MONTEFIORE, L. R. 2 Q. B. 511.

of disclosure usually arise with reference to the insured, yet the insurer is also required to act in perfect good faith towards the insured, and cannot, in making the contract, take any unfair advantage of him. This accounts for the readiness with which the courts apply the doctrine of estoppel as against the insurer when he seeks to take advantage of some condition of forfeiture in order to escape payment under the policy. As said by Christian, J., in *Manhattan Fire Ins. Co. v. Weill*,³⁵ "Where good faith and fair dealing are of the very essence of the contract of insurance, insurance companies will be estopped from asserting a defense which not only tends to a breach of good faith, but to actual and positive fraud."

A CONTRACT ESSENTIALLY OF INDEMNITY.

28. The basis of the contract of insurance is indemnity. Indemnity is its sole legitimate purpose, and any contract of insurance that contemplates a possible gain to the insured by the happening of the event upon which the liability of the insurer becomes fixed is contrary to the proper nature of insurance, and, in the absence of statute, will not be allowed. Hence:

- (a) No person may secure insurance upon property or lives in which he has no interest.
- (b) The value of the interest destroyed or damaged is, in every case, the limit of recovery under a contract of insurance upon such interest.
- (c) In marine insurance, the owner of property partially insured is deemed co-insurer to the extent of the value uncovered by the policy.
- (d) The insurer is entitled to be subrogated to any claim whereby the insured, who is indemnified under the terms of the policy, might have had his loss reduced or made good by some third party.

The Principle of Indemnity Requires the Presence of an Insurable Interest.

As has been shown before, any contract of insurance that does not contemplate indemnifying the insured against an actual loss that may be suffered by reason of the designated perils is a wagering policy, contrary to public policy and void. The interest subject to the perils insured against, and for the loss of which the contract provides an indemnity, is termed "insurable interest," and, inasmuch as a person having no insurable interest in the subject of insurance cannot suffer loss on account of stipulated perils, it is manifest that the presence of such insurable interest is necessarily required by the principle of indemnity. While it is therefore true that indemnity is

³⁵ 28 Grat. (Va.) 389, 396, 26 Am. Rep. 364. See, also, *Germania Ins. Co. v. Rudwig*, 80 Ky. 223.

the sole legitimate purpose of the ordinary contract of insurance, yet there are certain apparent limitations upon this general principle that deserve to be noticed. The contract provides for indemnity only for proximate damages resulting from the designated perils,³⁶ and does not ordinarily indemnify the insured for the loss of expected profits or other speculative benefits.³⁷ Neither does the contract provide for damages sustained by reason of the peculiar circumstances connected with the subject of insurance; that is, it can take into account no pretium affectionis, in the absence of specific valuation that may be based upon such peculiar value.

Rule as to Recovery under Valued Policies.

Under the strict principle of indemnity, the actual value of the subject of insurance is always the limit of recovery.³⁸ So, under the ordinary open policy, the amount written therein is intended to designate merely the maximum amount which may be recovered,³⁹ provided the amount of the loss may be proved to be so much; that is to say, that if under the ordinary policy a house is insured for \$10,000, and burns, the insured can in no event recover more than \$10,000, however much greater the real value of the house may be; but, if it can be proved that the house was in fact worth only \$8,000, its actual value thus ascertained is the limit of recovery. This principle of strict indemnity is, however, subject to some modifications in cases of valued policies. It is perfectly competent for the parties to a contract of insurance to determine by prior agreement what shall be regarded as the value of the property insured, in case of its destruction; and, in the absence of fraud, accident, or mistake, such valuation is the measure of recovery, even though it might be proved that the actual value of the property lost is more or less.⁴⁰ The mere fact of overvaluation is not a good defense to an action for the

³⁶ *Hillier v. Insurance Co.*, 3 Pa. 470, 45 Am. Dec. 656; *LYNN GAS & ELECTRIC CO. v. MERIDEN FIRE INS. CO.*, 158 Mass. 570, 33 N. E. 670, 20 L. R. A. 297, 35 Am. St. Rep. 540. See *FREEMAN v. ASSOCIATION*, 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753; *WHITE v. INSURANCE CO.*, 57 Me. 91, 2 Am. Rep. 22; *Travelers' Ins. Co. v. Mellick*, 65 Fed. 178, 12 C. C. A. 544, 27 L. R. A. 629.

³⁷ In the *Matter of Wright and Pole*, 1 Adol. & E. 621. "Indemnity does not contemplate unrealized profits." *Ostrander, Fire Ins.* (2d Ed.) § 180, quoted in *Niagara Fire Ins. Co. v. Hefflin* (Ky.) 60 S. W. 393.

³⁸ *STATE INS. CO. v. TAYLOR*, 14 Colo. 499, 24 Pac. 333, 20 Am. St. Rep. 281; *Fisher v. Insurance Co.* (C. C.) 33 Fed. 544.

³⁹ *Dacey v. Insurance Co.*, 21 Hun (N. Y.) 83.

⁴⁰ The insured may not prove that the value is more. *Holmes v. Insurance Co.*, 10 Metc. (Mass.) 211, 43 Am. Dec. 428. The insurer may not show that the value is less. *Borden v. Insurance Co.*, 18 Pick. (Mass.) 523, 29 Am. Dec. 614; *Patapsco Ins. Co. v. Biscoe* (Md.) 7 Gill & J. 293, 28 Am. Dec. 319 (insurance on freight); *HARRIS v. INSURANCE CO.*, 5 Johns. (N. Y.) 363.

amount set forth in a valued policy,⁴¹ though such overvaluation may be regarded as evidence of fraud; and, in case the overvaluation is great, its weight as evidence will be great.⁴² Such contracts of agreed valuation are analogous to agreements for liquidated damages in ordinary contracts.⁴³ While they may possibly result in the payment by the insurer of a sum that will more than indemnify the insured for the loss sustained in case of an overvaluation, not fraudulent, yet this is only an apparent exception to the rule that only indemnity can be provided by the contract of insurance. As has been intimated, it is always possible to show fraud in the valuation, and, in the absence of fraud, it is plain that at the time of the making of the contract the parties regarded the sum specified as the value of the property as merely the amount necessary to indemnify the owner for its loss.

Double Insurance—Contribution.

That nothing more than indemnity can be secured under the contract of insurance is illustrated in cases where the same property is covered by policies written by two or more insurers, and a partial loss occurs. Each of the insurers is liable for the whole amount of the loss up to the sum specified in his policy,⁴⁴ but the insured can recover his loss only once, and, if he has been fully indemnified in an action against one insurer, such recovery bars a subsequent action against a co-insurer.⁴⁵ The co-insurers stand to one another in the mutual relation of principal and surety, and that insurer who has been called upon to make good the loss to the insured has, of course, his right to recover proportionately from his co-insurers.⁴⁶ Such circuitry of procedure, however, is now generally avoided by the pro rata clause included in modern policies, whereby each one of several insurers is liable only for his ratable proportion of any partial loss that may be suffered.⁴⁷

⁴¹ *Sturm v. Insurance Co.*, 63 N. Y. 77; *FRANKLIN FIRE INS. CO. v. VAUGHAN*, 92 U. S. 516, 23 L. Ed. 740; *Borden v. Insurance Co.*, 18 Pick. (Mass.) 523, 29 Am. Dec. 614.

⁴² See post, "Fraud and False Swearing," p. 454.

⁴³ See *HARRIS v. INSURANCE CO.*, supra; *Sturm v. Insurance Co.*, supra.

⁴⁴ *NEWBY v. REED*, 1 W. Bl. 416; *Godin v. Assurance Co.*, 1 Burr. 489; *Thurston v. Koch* (C. C., Pa. Dist.) 4 Dall. 343, Fed. Cas. No. 14,016, 1 L. Ed. 862. See, also, *Wiggin v. Insurance Co.*, 18 Pick. (Mass.) 145, 29 Am. Dec. 576.

⁴⁵ *Williamsburg City Fire Ins. Co. v. Gwinn*, 88 Ga. 65, 13 S. E. 837.

⁴⁶ *LUCAS v. INSURANCE CO.*, 6 Cow. (N. Y.) 635; *Millandon v. Insurance Co.*, 9 La. 27, 29 Am. Dec. 433.

⁴⁷ In the New York standard fire policy this clause reads as follows: "This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by any expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent

The Insured a Co-Insurer under Marine Policies.

Under the usual contract of fire insurance the insurer, in case of a partial loss of the subject of the contract, is required to give full indemnity for such loss up to the amount written in his policy, even though the property be very inadequately insured. Thus, if property valued at \$10,000 is insured for \$5,000, and is damaged by fire to the extent of one-half of its value, the insurer will be compelled to pay the entire \$5,000 that is necessary to repair the loss. This, however, is not the rule in marine insurance, in which the insured is considered the co-insurer for an amount determined by the difference between the insurance taken out and the value of the property insured.⁴⁸ Thus, if a vessel worth \$100,000 is insured for only \$80,000, and is damaged to the extent of \$50,000, the insurer will be required to pay only 80 per cent. of the loss suffered, or \$40,000; the other 20 per cent., or \$10,000, being borne by the insured himself. It is sometimes stipulated in contracts of fire insurance that the insured shall be co-insurer to the extent that the property is not covered by the policy, and it is said that the rule applying in this respect to marine insurance governs in fire insurance also in France and other Continental countries.

The Insurer Entitled to Subrogation.

Inasmuch as the insured is under no circumstances entitled to receive any profit by reason of the contract of insurance, he is required, after being indemnified by the insurer for the loss suffered, to subrogate the insurer to any claims or right that he might have enforced against third parties, with respect to that loss, whereby it might have been either reduced or made good.⁴⁹ This right of subrogation, to which the insurer is thus entitled, will be discussed at length in a later chapter in this work.

insurers, covering such property." See *Cassity v. Insurance Co.*, 65 Miss. 49, 3 South. 138; *German Ins. Co. v. Helduk*, 30 Neb. 288, 46 N. W. 481, 27 Am. St. Rep. 402; *LUCAS v. INSURANCE CO.*, 6 Cow. 635.

⁴⁸ *Hughes on Admiralty*, 33, citing *Western Assur. Co. v. Transp. Co.*, 16 C. C. A. 65, 68 Fed. 923.

⁴⁹ *Brighthope Ry. Co. v. Rogers*, 76 Va. 433; *Springfield Fire & Marine Ins. Co. v. Allen*, 43 N. Y. 389, 3 Am. Rep. 711; *CASTELLAIN v. PRESTON*, 11 Q. B. Div. 380.

THE NATURE OF THE CONTRACT OF LIFE INSURANCE.

29. The ordinary contract of life insurance is based upon the principle of indemnity, but is not itself a contract of indemnity. It is rather a contract whereby one party, called the "insurer," purchases an annuity to be paid to him during the life of another, denominated the "insured," in consideration for which the insurer agrees to pay a specified sum upon the death of the insured. Public policy requires that the principle of indemnity shall be so far regarded as to hold that any contract for the insurance of a life, in the continuance of which the insured has no real interest, shall be void.

The life insurance contract differs materially from the other kinds of insurance. It may be, like them, purely a contract of indemnity, if the insurance is merely for a specified term, as, for instance, where insurance is granted upon the life of a person for the space of one year, or five years, as is the case in "natural premium" insurance. Such contracts, however, as has already been stated, are relatively infrequent. The ordinary contract of life insurance contemplates the certain payment of a specified sum at an uncertain time, and the premiums are so calculated that, in accordance with the insured's expectancy of life, there will be paid to the insurer as great, or a greater, sum in premiums and interest thereon than will become due at the death of the insured. In the case of fire or marine insurance, the insurer takes merely a risk that a loss may take place, it being known by experience that such losses do not occur in the great majority of cases; whereas, in life insurance, the event upon which the payment is to be made is absolutely certain to happen at some future time. The fact that the insurer thus accumulates from the premiums a sum which he holds to be paid out upon the death of the insured, introduces into this so-called "contract of insurance" a predominant element of speculative investment.⁵⁰ The presence of this element necessarily precludes the application of the principle of strict indemnity, since, as is easily seen, in the average case the insurer only pays back the money that has been given to him to hold in quasi trust for the insured.

Another serious obstacle in the way of regarding life insurance as a contract of indemnity exists in the difficulty to be encountered in fixing any sort of pecuniary value upon life. It is a well-recognized principle that, granting the existence of an actual interest, the law fixes no limit to the amount of insurance which may legally be placed

⁵⁰ *Phoenix Life Ins. Co. v. Bailey*, 13 Wall. 616, 20 L. Ed. 501; *Crosswell v. Indemnity Ass'n*, 51 S. C. 103, 28 S. E. 200. See, also, 6 Va. Law Reg. 775.

upon the life of any person, even though that person might be a helpless invalid whose life was rather a burden upon the party in interest than a benefit possessing a pecuniary value.

While life insurance thus cannot be regarded as a contract of indemnity to the same extent as fire or marine insurance, yet it is manifest that no practice could be more vicious than that of speculating in human life. Therefore a contract in which the assured has no insurable interest in the life of the insured is, on the broadest and soundest principles of public policy, absolutely void in this country,⁵¹ and also under the statute in England.⁵² As will be seen later, the criterion for determining the presence of an insurable interest is loss or detriment to be suffered by the insured upon the happening of the peril insured against; so it is clear that the basis of an insurable interest is indemnity. Therefore the contract of life insurance is based upon the principle of indemnity, in so far as it cannot exist unless there is an insurable interest in the party insured at the time of the making of the contract. But beyond this the principle of indemnity does not apply to life insurance. As was said by Parke, B., in the leading English case of *Dalby v. The India & London Life Assur. Co.*:⁵³ "The contract commonly called 'life assurance,' when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life; the amount of the annuity being calculated in the first instance according to the probable duration of life, and, when once fixed, is constant and invariable. This species of insurance in no way resembles a contract of indemnity." While the doctrine thus enunciated has been contested by some American authorities,⁵⁴ yet it may now be regarded as thoroughly well established by the overwhelming weight of authority in the United States.⁵⁵ The

⁵¹ *Trinity College v. Insurance Co.*, 113 N. C. 244, 18 S. E. 175, 22 L. R. A. 291; *SINGLETON v. INSURANCE CO.*, 66 Mo. 63, 27 Am. Rep. 321. In the latter case the court says that "the question may be considered an open one in this state," and, after citing numerous cases, concludes that a "policy of insurance procured by one upon the life of another, for the benefit of the former, who has no pecuniary interest in the continuance of the life insured, is against public policy, and therefore void." See, also, *infra*, p. 125.

⁵² Under 14 Geo. III, c. 48. See *HALFORD v. KYMER*, 10 Barn. & Cress. 724.

⁵³ *DALBY v. THE INDIA & LONDON LIFE ASSUR. CO.*, 15 C. B. 365. *Richards' Cases*, 271.

⁵⁴ See *May on Ins.* (3d Ed.) §§ 7, 8, 115, 116.

⁵⁵ *Trenton Mut. Life & Fire Ins. Co. v. Johnson*, 24 N. J. Law, 585; *Phoenix Life Ins. Co. v. Bailey*, 13 Wall. 616, 20 L. Ed. 501; *RAWLS v. INSURANCE CO.*, 27 N. Y. 282, 84 Am. Dec. 280; *Manhattan Life Ins. Co. v. Warwick*, 20 Grat. (Va.) 614, 3 Am. Rep. 218; *Nye v. Grand Lodge*, 9 Ind. App. 139, 36 N. E. 429; 2 Smith, Lead. Cas. 287; *RITTLER v. SMITH*, 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844; *Bacon's Ben. Soc. & L. Ins.* § 163. But see *Exchange Bank of Macon v. Loh*, 104 Ga. 446, 31 S. E. 459, 44 L. R. A. 372.

question usually arises when the interest, which the assured had in the life insured at the inception of the policy, has ceased before its maturity. In such case it is plain that the death of the person whose life is insured causes no loss to the assured which could be the subject of indemnity, and, if the principle of indemnity were to be strictly applied, there could certainly be no recovery by the insured under such circumstances; and such was the holding in the case of *Godsall v. Boldero*,⁵⁶ in which it was decided that a tradesman who had insured the life of William Pitt, to secure a debt owed to him by that statesman, could not recover under the policy after all Mr. Pitt's debts had been paid in accordance with an act of Parliament. But this case was overruled, and its doctrine distinctly repudiated, by the case of *Dalby v. The India & London Life Assur. Co.*,⁵⁷ which arose upon very similar facts. The doctrine of this last case has been adopted by the Supreme Court of the United States, which, in the case of *Connecticut Mut. Life Ins. Co. v. Schaefer*,⁵⁸ in which a divorced wife sought to recover under a policy upon the life of her former husband, held that the termination of the wife's interest in the life of her husband did not in any wise affect her right of recovery under the policy. Justice Bradley stated the law in these broad terms: "We do not hesitate to say, however, that a policy taken out in good faith, and valid at its inception, is not avoided by the cessation of the insurable interest, unless such be the necessary effect of the provisions of the policy itself." And this statement of the law seems to have been fully concurred in by other American courts.⁵⁹

THE NATURE OF MUTUAL BENEFIT INSURANCE.

30. Life insurance by mutual benefit associations and fraternal orders does not contractually differ in any material respect from regular life insurance. Since the purposes of such organizations, however, are benevolent, and not commercial, they are usually differentiated in the statutory regulation of insurance.

Life Insurance by Mutual Benefit and Assessment Associations.

The fact that the various benefit associations include insurance upon the lives of their members as only one of the many functions undertaken by them, has induced many authorities to make statements

⁵⁶ *GODSALL v. BOLDERO*, 9 East, 72.

⁵⁷ *DALBY v. THE INDIA & LONDON LIFE ASSUR. CO.*, supra.

⁵⁸ *CONNECTICUT MUT. LIFE INS. CO. v. SCHAEFER*, 94 U. S. 457, 24 L. Ed. 251.

⁵⁹ *Overhiser's Adm'x v. Overhiser*, 63 Ohio St. 77, 57 N. E. 965, 50 L. R. A. 552, 81 Am. St. Rep. 612; *Appeal of Corson*, 113 Pa. 438, 6 Atl. 213, 57 Am. Rep. 479; *RAWLS v. INSURANCE CO.*, 27 N. Y. 282, 84 Am. Dec. 280.

implying that insurance by such associations is peculiar, and not subject to the rules of law applying to the ordinary contract of life insurance.⁶⁰ This, however, is not correct. For whatever may be the ultimate motive of the members of such benefit associations, and however true that their membership may be based upon the fraternal desire of mutual aid, and for the promotion of social pleasure, yet the rights of members to demand the benefits due in case of sickness or death, in accordance with the terms of the membership certificate, is purely a contract right, and none the less subject to the rules of law applying to contracts of life insurance because of its intimate connection with the other benevolent purposes of the association. It may therefore be properly said that, so far as the contract of membership in such benefit associations provides for the contingent payment of money in case of sickness or death, the agreement is one purely of life insurance, and in no wise different from the contract of similar effect made by the so-called "old-line" companies.⁶¹ Yet there is this distinction between the contract ordinarily set forth in a membership certificate in a benefit association and the contract of the old-line companies. As has been shown above, the more popular forms of level premium insurance contain an important feature of investment, and, in so far, are not contracts of insurance at all; but, in the pure form of benefit or mutual assessment insurance, there is no feature of investment whatever. The contract contemplates merely the indemnifying of the insured against misfortune or death, and is therefore in its nature more strictly a contract of insur-

⁶⁰ *Commonwealth v. Equitable Ben. Ass'n*, 137 Pa. 412, 18 Atl. 1112; *State v. Iowa Mut. Aid Ass'n*, 59 Iowa, 125, 12 N. W. 782; *Commonwealth v. National Mut. Aid Ass'n*, 94 Pa. 481; *Ghosen Friends v. Fairman*, 62 How. Prac. (N. Y.) 386; *Commercial League Ass'n v. People*, 90 Ill. 166; *State v. Mutual Protection Ass'n*, 26 Ohio St. 19; *Northwestern Masonic Aid Ass'n v. Jones*, 154 Pa. 99, 26 Atl. 253, 35 Am. St. Rep. 810; *Martin v. Stubbings*, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620. These decisions will be found, however, to rest upon statutes specially providing for the incorporation of "societies for beneficial or protective purposes," or exempting such societies from the regulations imposed upon insurance companies. In the absence of statutory provisions, it is clear that any association even though it be benevolent or charitable, and provide benefits for its members or their beneficiaries only, incidentally, yet, if it contracts to pay a certain sum to such beneficiaries upon the decease of such members in consideration of contributions made by them, it is doing an insurance business. *COMMONWEALTH v. WETHERBEE*, 105 Mass. 149; *Endowment & Benev. Ass'n v. State*, 35 Kan. 253, 10 Pac. 872; *Chartbrand v. Brace*, 16 Colo. 19, 26 Pac. 152, 12 L. R. A. 209, 25 Am. St. Rep. 235; *Bolton v. Bolton*, 73 Me. 299; *State v. Farmers' Ben. Ass'n*, 18 Neb. 281, 25 N. W. 81; *Rensenhous v. Seeley*, 72 Mich. 603, 40 N. W. 765; *State ex rel. Atty. Gen. v. Merchants' Exch. Mut. Benev. Soc.*, 72 Mo. 146; *Bacon, Ben. Soc. & Life Ins.* § 52.

⁶¹ See, further, *Daniher v. Grand Lodge*, 10 Utah, 110, 37 Pac. 245; *Supreme Council v. Larmour*, 81 Tex. 71, 16 S. W. 633.

ance. It has also been shown heretofore, however, that in practice the mutual benefit associations are gradually approaching the methods of business used by the old-line companies, and that in nearly all cases there is provided some sort of reserve fund, whether called a "contingent fund," "emergency fund," or "surplus." The provision of such a fund is manifestly necessary to do away with the evil consequences that would ensue from fluctuations in the death rates or in the payment of assessments, or from other emergencies requiring an unusual and unexpected expenditure. But the accumulation of this fund is in so far a departure from the principles of purely mutual assessment insurance.

While the provision made by these benefit associations for paying sick and death benefits is thus nothing less than a contract of life insurance, and therefore subject to the same rules of law as apply in other similar contracts, yet such associations are frequently given a different standing from the old-line companies by special statutes that are enacted in their favor. In most of the states are found statutory provisions for the organization and conduct of these mutual benefit associations, and in such cases it has been held that the general law governing the conduct of life insurance business does not apply to benevolent associations established under the special law.⁶² Furthermore, it has been frequently held that the benevolent character of these associations will be recognized under the statute exempting charitable and benevolent associations from taxation, and it is not essential to the charitable nature of these associations that their benefits shall be bestowed upon all alike, without restriction to any designated classes. As said by Lewis, P., in *City of Petersburg v. Mechanics' Association*:⁶³ "The objects of the association, which was incorporated by the Legislature in 1826, are set forth in the constitution and by-laws, and in the preamble thereto, which declare that, in instituting a society of mechanics, charity should be the principal, but not the only object. Its revenues, as testimony shows, are wholly applied to the payment of its current expenses, the assistance of its indigent members, and the families of such of them as may have died in needy circumstances. These are charitable purposes, and the relief afforded is none the less charity because confined to the members of the association and the families of deceased members. It is not essential to charity that it shall be universal." In the language of the Tennessee court in a recent case:⁶⁴ "The order of

⁶² See *Commonwealth v. Equitable Ben. Ass'n*, 137 Pa. 437, 18 Atl. 1112; *State v. Whitmore*, 75 Wis. 332, 43 N. W. 1133; *Donald v. Railway Co.*, 98 Iowa, 284, 61 N. W. 971, 33 L. R. A. 492.

⁶³ 78 Va. 431, 436.

⁶⁴ *Supreme Lodge K. P. v. La Malta*, 95 Tenn. 157, 31 S. W. 493, 30 L. R. A. 838.

the Knights of Pythias is not a regular life insurance company, but it is a benefit association with life insurance as one feature, to be enjoyed or not by each particular member at his own election, and upon certain terms and conditions."

THE CONTRACT OF REINSURANCE.

31. Reinsurance is a contract whereby the reinsurer agrees to assume the whole, or a part, of a risk undertaken by the original insurer.⁶⁵ In its nature it is not different from a contract of original insurance, but it possesses some peculiarities. The contract is personal between the insurer and the reinsurer, and the original insured is no party to it.
- (a) The contract of reinsurance is an original undertaking, and not within the statute of frauds.
 - (b) The liability of the reinsurer under the contract is measured by the liability of the original insurer, not by his ability to pay.
 - (c) The original insured acquires no rights under the contract of reinsurance when the promise of the reinsurer is to pay the insurer, nor has he any lien upon money paid by the reinsurer.
 - (d) But when the reinsurer's promise is to pay losses incurred to the policy holders, the original insured then takes a right of suit under the contract thus made for his benefit, even though he is not a party to it.
 - (e) Any settlement made by the insurer, without the consent of the reinsurer, which imposes additional burdens upon the reinsurer, will release the latter from his liability.

Reinsurance is merely a further extension of the fundamental idea of insurance, that is, a distribution among many of the risk resting upon one. When an insurer finds that he has undertaken a single risk so great that the happening of the peril insured against would render him insolvent, or seriously cripple his efficiency, it is customary for him to reinsure such risk, or a portion thereof, with one or more other insurers. It sometimes happens, also, that an insurer desires entirely to relieve himself of liability under contracts made, and reinsures all his risks. Such contracts are plainly beneficial to the public, inasmuch as they promote both efficiency and stability in the conduct of the insurance business. Yet they have at times been in great disfavor as promoting speculation in the rise and fall of premiums, and were formerly prohibited in England by statute.⁶⁶ No such discrimination, however, has ever been made against contracts of reinsurance in this country,⁶⁷ and it has become a common practice among insurers. Of course,

⁶⁵ Defined in *Commercial Mut. Ins. Co. v. Detroit Fire & Marine Ins. Co.*, 38 Ohio St. 16, 43 Am. Rep. 413.

⁶⁶ 19 Geo. II, c. 37. Repealed 30-31 Vict. c. 23.

⁶⁷ 3 Kent, Comm. 278; *PHOENIX INS. CO. v. ERIE & W. TRANSP. CO.*

it stands to reason that a contract of reinsurance, like any other contract of insurance, must be supported by an insurable interest; therefore the reinsurance may not be for a greater amount than the original insurance, although it may be easily for a less amount.⁶⁸ Likewise, the amount payable under the contract of reinsurance cannot be more than an indemnity to the insurer, and, if the insurer becomes liable to pay any sum less than the amount of reinsurance, the sum so payable will fix the liability of the reinsurer.⁶⁹

Contracts Improperly Termed Reinsurance.

It is well to call to the reader's attention the distinction which exists between a contract of reinsurance and other somewhat similar contracts that frequently pass under the same name. When a person who has already insured his property secures a second insurance upon the same property, the second contract is frequently called "reinsurance," but this is merely a case of double insurance, and not at all "reinsurance" in the technical sense of the word. Another instance of the untechnical use of the word occurs when two insurance companies are consolidated, or when one buys out another, assuming all of its policies and obligations, in order that that other may discontinue its business. In such cases the consolidated company, or the purchasing company, is said to "reinsure" the risks of the company that ceases to exist; but this is a case of substitution, in which the so-called "reinsurers" engage to take the place of the original insurer, and themselves directly to make good losses to the holders of the original policies. It must be borne in mind that such cases of consolidation, or of successive insurance, are not technically cases of reinsurance, and what is said of the rules of law determining the peculiar rights of the parties to the contract of reinsurance does not apply to the cases mentioned. It is also to be noted that the contract of reinsurance does not amount to a novation, even when the contract provides for a payment by the reinsurer directly to the original insured, in case of the happening of the event insured against. This is so although the original insured may accept the obli-

117 U. S. 312, 323, 6 Sup. Ct. 750, 29 L. Ed. 873; *Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485, 1 Sup. Ct. 582, 27 L. Ed. 337; *MERRY v. PRINCE*, 2 Mass. 176. "There can be no doubt that the original insurer may protect himself to the whole extent of his liability." *Insurance Co. of North America v. Hibernia Ins. Co.*, 140 U. S. 565, 11 Sup. Ct. 909, 35 L. Ed. 517. See, also, *Acts Va. 1895-96*, p. 452, c. 421.

⁶⁸ *Berry v. Insurance Co.*, 132 N. Y. 49, 30 N. E. 254, 28 Am. St. Rep. 548; *Manufacturers' Fire & Marine Ins. Co. v. Western Assur. Co.*, 145 Mass. 419, 14 N. E. 632; *Insurance Co. of North America v. Hibernia Ins. Co.*, 140 U. S. 565, 11 Sup. Ct. 909, 35 L. Ed. 517; *Commonwealth Ins. Co. v. Globe Insurance Co.*, 35 Pa. 475.

⁶⁹ *ILLINOIS MUT. FIRE INS. CO. v. ANDES INS. CO.*, 67 Ill. 362, 16 Am. Rep. 620.

gation assumed by the reinsurer, and bring suit against him to enforce the payment undertaken under the contract.⁷⁰

Statute of Frauds.

There is some conflict of authority as to whether an agreement to make a contract of reinsurance is enforceable if made by parol. There is authority for holding that the agreement of the reinsurer is to answer for the debt of another, and therefore must be in writing in order to be binding.⁷¹ But this view arises from a misconception of the nature of the contract. It is an agreement made with the debtor to indemnify him against any debt that may be incurred under the original contract of insurance, and is not a promise made to the creditor, and therefore does not fall within that class of cases required to be in writing by the fourth section of the statute of frauds.⁷² Furthermore, the contract would be taken out of the statute by reason of its being an original undertaking to indemnify the insurer against liability, and not a collateral contract of guaranty.

The Rights of the Insurer and the Reinsurer.

The subject of the contract of reinsurance is the insurer's risk, and not the property insured under the original policy.⁷³ The policy of reinsurance is necessarily based upon the original policy, and the rights of the parties, while of course fixed by the terms of the policy of reinsurance, are yet greatly affected by the terms and conditions of the original policy upon which the reinsurance contract is based. The reinsurer's agreement thus rests upon the original policy as its basis, though the terms of the original policy are not necessarily on that account incorporated within the policy of reinsurance. Therefore the reinsurer will not be liable to the insurer in case the latter might have avoided payment of the loss under any of the terms of the original policy,⁷⁴ though a bona fide payment of a doubtful claim by the insurer, after notice to the reinsurer, fixes the liability of the latter. But the conditions, representations, and warranties of the original policy are to be construed, in determining the rights of the reinsurer and insurer, as of the time of the execution of the policy. Thus the fact that representations made by the insured were untrue at the time of the execution of the policy of reinsurance will not affect the liability of the rein-

⁷⁰ See *Barnes v. Insurance Co.*, 56 Minn. 38, 57 N. W. 314, 45 Am. St. Rep. 438. *Contra*, *Wood v. Moriarty*, 15 R. I. 522, 9 Atl. 427.

⁷¹ *Egan v. Insurance Co.*, 27 La. Ann. 368.

⁷² *Commercial Mut. Ins. Co. v. Union Mut. Ins. Co.*, 19 How. (U. S.) 318, 15 L. Ed. 636; *Bartlett v. Insurance Co.*, 77 Iowa, 158, 41 N. W. 601; *Clark*, *Cont.* p. 98.

⁷³ *Jackson v. Insurance Co.*, 99 N. Y. 124, 130, 1 N. E. 539.

⁷⁴ *Eagle Ins. Co. v. Lafayette Insurance Co.*, 9 Ind. 443, 447; *Merchants' Mut. Ins. Co. v. New Orleans Mut. Insurance Co.*, 24 La. Ann. 305.

suror, provided such representations were true at the time of the making of the original contract.⁷⁵

As regards the obligation to the insured, the relation between the reinsurer and the insurer is that of principal and surety. It is the duty of the insurer, whenever a question of doubtful liability arises under any of his policies, to give notice to the reinsurer, who should then determine whether the claim will be resisted or paid. In case, however, the reinsurer takes no action, it is proper for the insurer to make defense if he thinks the claim can be successfully resisted, and the expenses attendant upon such litigation can be charged against the reinsurer in case the judgment of the court is adverse to the insurer.⁷⁶ But it seems that if the insurer is successful in the prosecution of his suit he has no claim for costs against the reinsurer, inasmuch as, by theory at least, he is indemnified against his costs by having them taxed against the defeated plaintiff in the suit.⁷⁷ This rule, however, seems to be of doubtful correctness. If the unsuccessful insurer may demand reimbursement from the reinsurer for all proper expenses incurred in his effort to avoid payment, including attorney's fees, there would seem to be no sound reason why such expenses incurred, above the taxable costs in the suit, for attorney's fees, and other proper causes of expenditure, should not also be charged to the reinsurer in case the insurer is successful in the litigation.

The reinsurer agrees to indemnify the insurer, not against actual payments made, but against liabilities incurred; therefore it is by no means necessary that the insurer shall first have paid a loss accruing, as a condition precedent to his demanding payment of the reinsurer. In fact, the insolvency of the insurer, which precludes his ever meeting in full the obligation incurred to the insured under the original policy, does not in any wise affect the right of the insurer to demand payment in full under the policy of reinsurance.⁷⁸ A difficult question arises, however, when there has been an actual settlement made by the insurer with the original insured for a less sum than that set forth on the face of the policy. While it is true that it is the liability only of the insurer that measures the liability of the reinsurer, it is also to be kept in mind that the contract of reinsurance is, like any other proper con-

⁷⁵ *Cohen v. Insurance Co.*, 50 N. Y. 610; *Jackson v. Insurance Co.*, 99 N. Y. 124, 1 N. E. 539.

⁷⁶ *New York State Marine Ins. Co. v. Protection Insurance Co.*, 1 Story, 458, Fed. Cas. No. 10,216. And a judgment against the insurer in a proceeding of which the reinsurer had notice is conclusive upon the reinsurer. *Commercial Union Assur. Co. v. American Cent. Ins. Co.*, 68 Cal. 430, 9 Pac. 712; *Strong v. Insurance Co.*, 62 Mo. 289, 21 Am. Rep. 417.

⁷⁷ *Faneuil Hall Ins. Co. v. Liverpool & L. & G. Ins. Co.*, 153 Mass. 63, 26 N. E. 244, 10 L. R. A. 423.

⁷⁸ *Blackstone v. Insurance Co.*, 56 N. Y. 104; *Joyce on Ins.*, § 133.

tract of insurance, a contract merely of indemnity. Therefore the proper ruling in all cases should be that, where the insurer has made an actual settlement for a less amount than that stipulated in the policy, when such settlement has already discharged the liability of the insurer to the original insured, the reinsurer should never be liable for a greater amount than the sum actually paid under the settlement.⁷⁹ But the cases involving a final settlement between the insurer and the insured, whereby the former is discharged from the obligation of his contract, are to be carefully distinguished from those cases in which the receiver of an insolvent company pays out to the creditors of the company only a certain percentage of their total claims against the company. Thus, if an insolvent company settles with its creditors at 50 per cent. of their claims, the reinsurer cannot claim to have his liability to the insolvent insurer scaled down 50 per cent., inasmuch as the right of the insolvent company to enforce its entire claim against the reinsurer is a part of the assets of the insolvent's estate, and the reinsurer is not in a position to claim the benefits of a settlement that may have been made solely for the creditors.⁸⁰ If, however, there had been a composition between the insolvent insurer and those having claims under the policies, whereby the insurer is discharged, and a matured obligation by the reinsurer has not been reckoned among the assets of the insolvent, it would seem, on principle, that the reinsurer should not be liable under his policy for a sum greater than that which was paid out by the insurer under the policy which served as the basis for the contract of reinsurance.⁸¹

The Rights of the Original Insured.

(1) The original insured may stand in any one of three relations towards the reinsurer, in accordance with the terms of the particular contract of reinsurance: In case the contract is solely between the insurer and the reinsurer, contemplating only an indemnity to the insurer against losses suffered by reason of the policies carried by him, the original insured has absolutely no interest in the contract, and is a total stranger to it.⁸² He has no claim upon the reinsurer, nor can he demand that a preference shall be given to him in case of the insolvency of the insurer in the distribution of a fund received by the insurer from the reinsurer on account of a loss suffered under the original policy. Money so paid by the reinsurer becomes but a part of the general assets of the insurer, and all of his creditors have an equal

⁷⁹ *ILLINOIS MUT. FIRE INS. CO. v. ANDES INS. CO.*, 67 Ill. 362, 16 Am. Rep. 620.

⁸⁰ *Blackstone v. Insurance Co.*, 56 N. Y. 104; *Mutual Safety Ins. Co. v. Hone*, 2 N. Y. 235.

⁸¹ See *Consolidated Fire Ins. Co. v. Cashow*, 41 Md. 59.

⁸² *Barnes v. Insurance Co.*, 56 Minn. 38, 57 N. W. 314, 45 Am. St. Rep. 438; *GOODRICH'S APPEAL*, 109 Pa. 523, 2 Atl. 209; *Woodruff's Cases on Insurance*, 71.

right with the original insured to demand payment out of such fund.⁸³

(2) The contract of reinsurance may contain a term whereby the reinsurer binds himself to pay any loss that may fall upon the insurer to the policy holders concerned. Under the common-law rule as established in most of the United States, though not in England, and confirmed in many states by statutory provisions, a third party for whose benefit a contract is made is allowed to enforce such contract by suit against the promisor.⁸⁴ Therefore the reinsurer who has promised to pay the losses accruing under the original policies directly to the holders of such policies will be liable to a suit by the original insured under the contract of reinsurance. But the right thus given to the insured to enforce the contract of payment against the reinsurer does not at all release the insurer from the liability assumed under the original policy. The remedy of the insured is double, and, while he may not have a double satisfaction of his claim, he is not required to elect between his remedies against the reinsurer and the insurer, but may prosecute his suit against both until he secures a complete satisfaction of his claim. Thus, in the case of *Barnes v. Hekla Fire Ins. Co.*,⁸⁵ the defendant company had reinsured its risk under a policy granted to the plaintiff in the St. Paul German Insurance Company. The reinsuring company had agreed to assume and pay all losses to policy holders. After a loss had occurred under the policy, the German Insurance Company became insolvent, and the plaintiff filed his claim under the contract of reinsurance in the insolvency proceedings. While such proceedings were still pending, the plaintiff sued the defendant, the original insurer, for the whole amount due under the policy. The defendant sought to set up the claim made by the plaintiff against the German Insurance Company in bar of the suit, but the court held that such a claim did not affect the plaintiff's right of action against the defendant, stating the law as follows: "A creditor is put to an election only where his remedies are inconsistent, and not when they are consistent and concurrent. In the latter case a party may prosecute as many as he has, as in the case of several debtors; and so, if in this instance the remedy against the insolvent company, as respects the plaintiff, was merely cumulative, there is no reason why

⁸³ *GOODRICH'S APPEAL*, 109 Pa. 523, 2 Atl. 209; *Glen v. Insurance Co.*, 56 N. Y. 379; *Barnes v. Insurance Co.*, *supra*; *Arnould, Marine Ins.* § 324. *Contra. Shoaf v. Insurance Co.*, 127 N. C. 308, 37 S. E. 451, 80 Am. St. Rep. 804.

⁸⁴ *Lawrence v. Fox*, 20 N. Y. 268; *Clark, Cont.* 513. Otherwise in Massachusetts: *Exchange Bank of St. Louis v. Rice*, 107 Mass. 37, 9 Am. Rep. 1. Cf. *Code Va.* 1887, § 2415.

⁸⁵ 56 Minn. 38, 57 N. W. 314, 45 Am. St. Rep. 438.

she may not pursue either or both. As between the two companies, the defendant occupies no better position than a surety."

Where the contract of reinsurance contains an agreement to make payment directly to the policy holder, the liability of the reinsurer at the suit of the insured will not be affected by the fact that the reinsurer would have a good defense against a demand of payment by the insurer. Thus, where the *Craftsman's Life Assurance Company* had issued three policies of five thousand dollars each upon the life of one Hall, payable to the plaintiffs, and the defendant company had agreed to reinsure the *Craftsman's Company* on all its outstanding risks, and to pay the holders of its policies such sums as the insurer might become liable to pay, it was held that the defendant reinsurer was liable at the suit of the plaintiffs, the original insured, to pay the policies in full upon the death of Hall, although the *Craftsman's Company* had effected with two other companies policies of reinsurance upon the life of Hall for five thousand dollars each.⁸⁶ As between the *Craftsman's Company*, which had received ten thousand dollars from its contracts of reinsurance upon the policies in suit, and the defendant reinsurer, the reinsurer would unquestionably have been liable only for the residue of the sum due from the insurer upon the three original policies—that is, five thousand dollars—but this could not relieve the defendant company from its obligation to make good its agreement to pay the fifteen thousand dollars to the plaintiffs.

While, under such contracts of reinsurance as we are now treating, the original insured has, by virtue of the term in the policy of reinsurance, a right to enforce payment directly from the reinsurer, it is yet to be remarked that the attempt to enforce this right by the insured does not create a novation which discharges the original policy. Instead, the original contract remains in full force, and the original insured may rightfully demand that all of its terms and conditions shall be complied with in accordance with its tenor. Therefore, if the insurer grants any permissions or privileges, or gives consent to any change of conditions in accordance with his powers under the contract, such action on his part will be binding upon the reinsurer, even though the policy of reinsurance may provide that such acts as would affect or change the rights of the insured under the original policy should be done by the reinsurer. Thus a clause in a policy of reinsurance making the reinsurer the agent of the original insurer for the purpose of doing, in regard to all outstanding policies covered by the contract of reinsurance, all acts necessary to transfer such policies in accordance with their conditions, does not prevent the original insurer from lawfully con-

⁸⁶ *Glen v. Insurance Co.*, 56 N. Y. 379.

sending to the transfer of a policy, since the reinsurer by the clause in not made the sole agent for such transfer.⁸⁷ So, where a reinsurer had agreed to indemnify the insurer against all loss and damages sustained by reason of certain designated outstanding policies, it was held that the original insured might recover from the reinsurer the damages sustained by reason of the failure of the insurer to accept premiums due and to continue its policies in force.⁸⁸ The insured was not obliged to accept the reinsurer in place of the original insurer, and, upon the failure of the insurer to continue performance under his contract, the insured was of course entitled to damages for breach of agreement, and, under the terms of the contract of reinsurance, such damages could be recovered directly from the reinsurer.

(3) A third kind of relation between the original insured and the reinsurer may arise in those cases in which the circumstances attending the making of the contract of reinsurance amount to a novation of the original contract, and hence operate to discharge that contract and the original insurer from all obligation thereunder. Such a result can arise, however, only when the insured agrees with the insurer and reinsurer that he will accept the obligation of the reinsurer in consideration of the discharge of that of the insurer. Such an agreement is ordinarily carried into effect by a surrender of the original policy, and the issue of another policy under the same terms and conditions by the so-called "reinsurer." As is shown above, however, such a transaction is not one of technical reinsurance, for here the so-called "reinsurer" is but substituted for the original insurer, and hence becomes the immediate insurer of the subject of the original policy, instead of being the insurer of the original insurer's risk by reason of such policy, as would be the case if the transaction were one of proper reinsurance. In such cases of novation the original insurer is, of course, wholly discharged from any obligation that may have existed under the former policy, and the insured in turn secures the same rights against the so-called "reinsurer" as if the policy had been originally issued by him.⁸⁹

⁸⁷ *Faneuil Hall Ins. Co. v. Liverpool & L. & G. Ins. Co.*, 153 Mass. 63, 26 N. E. 244, 10 L. R. A. 423.

⁸⁸ *Fisher v. Insurance Co.*, 69 N. Y. 161.

⁸⁹ See *Johannes v. Insurance Co.*, 66 Wis. 50, 27 N. W. 414, 57 Am. Rep. 249; *Glen v. Insurance Co.*, 56 N. Y. 379.

WHEN THE CONTRACT IS DIVISIBLE.

32. The peculiar character of the insurance contract raises a strong presumption in all cases that its terms are to be construed as parts of an indivisible whole. But this general rule may be well supplemented as follows:
- (a) Whether the contract is divisible or indivisible is a question purely of intention, rightly expressed, and the effort of the courts should be to give effect to the fair intent of the contract taken as a whole.
 - (b) When the contract grants insurance upon several separate subjects in consideration of separate premium charges, the contract is divisible, and the invalidity of one part will not affect another.
 - (c) When the contract covers several different subjects of insurance which are separately valued, but the consideration is a single gross premium, there is great conflict among the decisions as to the character of the contract, whether divisible or indivisible. On principle, however, the rules of construction obtaining may be stated as follows:
 - (1) If the terms of the contract distinctly state that any misrepresentation or breach of condition with reference to any of the several subjects of insurance under the policy will defeat all rights of the holder under the policy, the contract is then to be regarded as indivisible.
 - (2) If the misrepresentation or breach of condition with regard to one of the several subjects is of such a character as materially to increase the risk in regard to the other subjects covered by the policy, then as to such condition the contract is indivisible.
 - (3) But if the misrepresentation or breach of condition is such as to affect only one of the subjects, then the contract is deemed divisible, and the rights of the insured with reference to the other subjects covered by the policy are not affected.

One of the most difficult questions in insurance law coming before the courts for decision arises when there are embraced under a single contract of insurance several different and distinct subjects, and the defense of the insurer consists in some misrepresentation or the breach of some condition with regard to only one of the subjects. It is manifest that if the contract is indivisible, and there has been a breach of a single condition, or any misrepresentation whatsoever, the policy holder acquires no rights whatever under it; but, if the contract can be held divisible, it may be invalid as to one subject and valid as to others. The terms of the policy themselves very often distinctly indicate what is the intention of the parties with reference to its construction in this respect; and since the question of divisibility, like every other one of construction, depends altogether upon

the properly expressed intention of the parties, in such cases the courts find little difficulty in determining the rights of the parties under a policy embracing several different kinds of property. But in the absence of such clear expression of intention great difficulty is experienced in the construction of those policies which cover several different kinds of property, each having a distinct valuation, but the premium for the insurance of all being one gross sum. The typical case is where a single policy is issued upon a house and its contents, each being separately valued, but the consideration being a gross premium. Mr. Parsons states the rule in these concise terms: "If the consideration to be paid is single and entire, the contract must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items."⁹⁰ Or, as it is expressed in the case of *McClurg v. Price*:⁹¹ "If the consideration is single, the contract is entire, whatever the number or variety of the items embraced in the subject." The rule as thus stated has received the approval of, and been enforced by, many of the courts in the various states;⁹² but it is submitted that it is too arbitrary in form, and is not based upon the true principles involved in the determination of all such cases. As was stated above, the question of the divisibility of the contract of insurance is purely one of intention, and any arbitrary rule of construction is apt to work confusion in the law and hardship upon litigants. It is true that the presumption is in favor of the indivisibility of the contract on account of the singleness of the consideration, but other circumstances attending the making of the contract may show that the single premium received, in the case of insurance upon separately valued subjects, is but for the mutual convenience of the parties, and that it does not really mean that the parties intend that the contract shall be regarded as inseparable.

The reasonable view to be taken of the apparently conflicting cases involving this question would seem to be this: If the several separately valued subjects of insurance under the policy in question are so closely connected that any representation or condition that will affect the character of the risk upon one subject will extend also to the others, then the policy should be regarded as indivisible, and the breach of any condition, or any misrepresentation with reference to one, should avoid the insurance on all.⁹³ Or, if any

⁹⁰ 2 Pars. Cont. 519.

⁹¹ 59 Pa. 420, 98 Am. Dec. 356.

⁹² *Ætna Ins. Co. v. Resh*, 44 Mich. 55, 6 N. W. 114, 38 Am. Rep. 228; *Hinman v. Insurance Co.*, 36 Wis. 159; *Bowman v. Insurance Co.*, 40 Md. 620; *Gould v. Insurance Co.*, 47 Me. 403, 74 Am. Dec. 494.

⁹³ *Agricultural Ins. Co. of Watertown v. Hamilton*, 82 Md. 88, 33 Atl. 429,

circumstances of fraud, whether of misrepresentation or concealment, have attended the making of the contract, such fraud should be held to avoid the whole contract, even though it may have direct reference only to one of the several subjects insured, when such fraudulent misrepresentation or concealment has clearly affected the making of the contract;⁹⁴ that is to say, fraud that has procured the making of the contract will avoid the whole contract, even though such fraud may be limited to only a part of the contract. But, on the other hand, where the different kinds of property insured under the one policy for a single premium are so entirely dissociated as that the risks attaching to each are distinctly separable, there is no sufficient reason for holding that a misrepresentation or a breach of condition with reference to one kind of property should have any effect whatever upon the validity of insurance upon the other kinds, in the absence of express provisions to that effect, and provided there has been no fraudulent procurement of the contract.⁹⁵ This principle is well illustrated in the well-reasoned case of *Loomis v. Rockford Insurance Co.*⁹⁶ In this case the plaintiff had insured three houses, situated on separate farms, under a single policy, and for a single premium. Subsequently to the issuing of the policy, the farm upon which one of the insured houses stood was sold by the plaintiff without the consent of the insurer. Under a provision of the policy, any change in the title to the property insured, without the consent of the insurer, avoided the policy. After this alienation without consent, one of the houses that remained under the ownership of the plaintiff was destroyed by fire. In an action brought by the plaintiff under the policy, the insurer set up the breach of the alienation clause in defense. But the court very properly held that the contract was divisible, and that the breach of the condition as to one of the houses did not affect the contract as to the other two, and thus stated the law applying: "The general rule, 'Void in part, void in toto,' should apply to all cases where the contract is affected by some all-pervading vice, such as fraud, or some unlawful act condemned by public policy or the common law; cases where the contract is entire, and not divisible; and all those cases where the matter that renders the policy void in part, and the result of its being so

⁹⁰ L. R. A. 633, 51 Am. St. Rep. 457, in which a policy on a house and personalty therein was held to be avoided as to both by vacancy of the house. To the same effect, see *Stevens v. Insurance Co.*, 81 Wis. 335, 51 N. W. 555, 29 Am. St. Rep. 905.

⁹⁴ *Moore v. Insurance Co.*, 28 Grat. (Va.) 508, 26 Am. Rep. 373.

⁹⁵ *Havens v. Insurance Co.*, 111 Ind. 90, 12 N. E. 137, 60 Am. Rep. 689; *Manchester Fire Assur. Co. v. Glenn*, 13 Ind. App. 365, 40 N. E. 926, 41 N. E. 847, 55 Am. St. Rep. 225.

⁹⁶ 77 Wis. 87, 45 N. W. 813, 8 L. R. A. 834, 20 Am. St. Rep. 96.

rendered void, affects the risk of insurance upon the other items in the contract. Keeping these rules in mind, the leading cases upon this subject can all be reconciled. A recovery should be had in all those cases where the contract is divisible, the different properties insured for separate sums, and the risk upon the property, which is claimed to be valid, unaffected by the cause that renders the policy void in part."

Another phase of the same principle is illustrated in *Connecticut Fire Insurance Co. v. Tilley*,⁹⁷ in which the contract was held separable for the benefit of the insurer. The plaintiff had taken out a single policy on sixteen tenement houses, paying therefor a single premium. The policy contained the usual provision that if the premises remained vacant for ten days without the company's assent the policy should be void. Several of the houses covered by the policy remained vacant for a longer period than ten days, and without the company's assent, and were vacant at the time of the fire, which destroyed all of them. The plaintiff contended that the contract was entire, and that the premises were therefore not vacant so long as any one of the houses was occupied. The court, however, declined to hold the contract indivisible, notwithstanding the payment of a single premium, and allowed the plaintiff to recover only for such of the houses as had not become vacant.

REQUISITES FOR THE VALIDITY OF THE CONTRACT.

33. In order that the contract of insurance shall be valid, it must possess all the essential elements that are requisite to the validity of any other contract; that is:

- (a) There must be an agreement resulting from an offer and acceptance.
- (b) In order to be binding, this agreement—
 - (1) Must be in the form required by law.
 - (2) There must be two parties legally capable of contracting.
 - (3) It must be supported by a valuable consideration, unless such consideration be dispensed with by reason of a seal.
 - (4) The purpose of the contract must be legal, and not in contravention of public policy.
- (c) In addition, the insurance contract must be made fairly, the consent of each of the parties being given upon a full knowledge of all material and relevant facts known to the other.

The peculiar nature of the contract of insurance having now been set forth, it becomes necessary to examine the rules by which it may be determined when the contract is validly executed. It may be said,

⁹⁷ 88 Va. 1024, 14 S. E. 851, 29 Am. St. Rep. 770.

in general, that the contract of insurance must possess the same requisites of validity that must characterize any other contract. But there are some special rules growing out of the peculiar nature of the contract itself, and the peculiar relation of the parties thereto will require us to examine in detail the application of principles that are already familiar to the student of contract law. The considerations that primarily require this special treatment in the case of insurance contracts are: (1) The quasi public character of insurance business, which has induced a large measure of statutory restraint and control of insurance companies and regulation of insurance contracts; and (2) because the relation of the parties to the contract of insurance is in a measure fiduciary, and therefore, in the making of all insurance contracts, each party is under obligation to exercise the highest degree of good faith towards the other. The consequent special rules of law affecting the formation of the contract of insurance will therefore be now taken up and examined in detail.

CHAPTER III.

PARTIES.

- 34. In General.
- 35. Who May be Insurers.
- 36. The Several Kinds of Corporate Insurers.
- 37-38. The Rights of Foreign Insurers.
- 39. Contracts Made by Insurers not Complying with Statutory Requirements.
- 40. Who May be Insured.
- 41. Infants as Parties Insured.
- 42-43. Aliens as Parties Insured.
- 44-45. Insane Persons as Parties Insured.

IN GENERAL.

34. There must be at least two parties to every contract of insurance, the insurer and the insured, and there may be a third, the assured or beneficiary. At common law any person capable of making a valid contract may become a party to a contract of insurance, but the contract is one affected by a public interest, and is, therefore, a proper subject for governmental regulation. Such regulation may impose special qualifications as necessary for those who would become parties to the contract. The relation between insurer and insured is that of debtor and creditor, subject to the conditions of the policy, and not that of trustee and cestui que trust.

As in the case of any other contract, there must be at least two parties to a valid contract of insurance. A person cannot contract for insurance with himself, even though, in so doing, he may suppose that he is acting for the insurance company. It has therefore been held that where an agent or other representative of the insurance company, having power to contract on its behalf, insures his own property, or issues a life policy to himself, such insurance is invalid.¹ The authority of the agent does not extend to any transaction in which his personal interest is opposed to that of his principal.

While there must always be two parties, there may be three, or even four, parties to a contract of insurance. Thus, when one person takes out insurance upon the life of another, the consent of both the assured

¹ Pratt v. Insurance Co., 130 N. Y. 206, 29 N. E. 117. See, also, Nenendorff v. Insurance Co., 69 N. Y. 389; Wildberger v. Insurance Co., 72 Miss. 338, 17 South. 282, 28 L. R. A. 220, 48 Am. St. Rep. 558; Greenwood Ice & Coal Co. v. Georgia Home Ins. Co., 72 Miss. 46, 17 South. 83.

and the insured, and of the insurer, is necessary to the validity of the contract. In case the assured assigns such a policy to a fourth party with the consent of the insurer, the assignee then becomes properly a party to the contract.² So there may be a third party to a contract of fire insurance, as where the standard mortgagee clause is attached to a policy of insurance upon the mortgaged property. The mortgagee in such case becomes a proper party to the contract, who may enforce it by an action in his own name, and whose rights under the contract will not be defeated by the default of the party insured.³

The person who grants the insurance is termed the "insurer," and the second party to the contract is called, indifferently, the "insured" or "assured."⁴ There has been some effort made by text-writers and in some of the decisions to make a distinction in the use of the terms "insured" and "assured."⁵ The latter has been said to designate the person for whose benefit the insurance is granted, while the word "insured" indicates the person whose life is the subject of the contract. While such a distinction has the sanction of very respectable authority, it cannot be said to be maintained with such consistency as to entitle it to the dignity of a rule of law.

It is customary that the second party to the contract shall be expressly designated, but this is by no means necessary. The name of the insured may be left blank, and parol testimony is admissible to show who is intended as the insured.⁶ It is not unusual that policies shall be issued "for the benefit of whom it concerns." This phrase, however, is not so broad in its legal effect as its apparent meaning would seem

² Kingsley v. Insurance Co., 8 Cush. (Mass.) 400; Biddeford Sav. Bank v. Dwelling-House Ins. Co., 81 Me. 571, 18 Atl. 299; Tremblay v. Insurance Co., 97 Me. 547, 55 Atl. 509, 94 Am. St. Rep. 521.

³ See Capital City Ins. Co. v. Jones, 128 Ala. 361, 30 South. 674, 86 Am. St. Rep. 152; Hastings v. Insurance Co., 73 N. Y. 141.

⁴ See Equitable Life Assur. Soc. v. Commonwealth (Ky.) 67 S. W. 388, where this second party is termed the "insurant."

⁵ Ferdon v. Canfield, 104 N. Y. 143, 10 N. E. 146; Smith v. Insurance Co., 5 Lans. (N. Y.) 545. "There are undoubtedly instances where this distinction between the terms 'assured' and 'insured' is observed, though we do not find any judicial consideration of it. The application of either term to the party for whose benefit the insurance is effected, or to the party whose life is insured, has generally depended upon its collocation and context in the policy." Per Mr. Justice Field in Connecticut Mut. Life Ins. Co. v. Luchs, 108 U. S. 498, 2 Sup. Ct. 949, 27 L. Ed. 800.

⁶ Burrows v. Turner, 24 Wend. (N. Y.) 276, 35 Am. Dec. 622, and note. "The policy is valid, although no particular person was named therein as the assured." Weed v. Insurance Co., 133 N. Y. 401, 31 N. E. 231, and cases cited. So, where the insurance was effected by certain brokers named therein, "for the owners, payable" to such brokers, the owners were permitted to sue on the policy in their own names. Farrow v. Insurance Co., 18 Pick. (Mass.) 53, 29 Am. Dec. 564. But see dictum in Newson's Adm'r v. Douglass, 7 Har. & J. (Md.) 417, 16 Am. Dec. 317.

to imply. It is merely equivalent to saying that the policy is taken out on behalf of some person not designated; and, while the person contemplated as beneficiary under such policy by the person taking it out may take the benefit of it by ratifying the act of his agent, even when it had been without authority,⁷ it has been held that the interest of a stranger not in the contemplation of either of the original parties to the contract cannot be protected thereunder.⁸

Statutory Regulations.

In the absence of statutory provision there is no reason whatever why any person sui juris may not make a contract of insurance, whether as insurer or insured. But since the business has assumed such great proportions, and its proper conduct has become of such vital importance to the welfare of the public, the contract of insurance is now regarded as a proper subject for legislative control.

In the language of the Pennsylvania court in a recent case,⁹ "The business of insurance against loss by fire is, by reason of its magnitude, its importance as to property owners, and the nature of the business, a proper subject for the exercise of the police power of the state." As to how far the police power, properly invoked for the regulation of so important a business, shall extend in fixing the qualification of those who are going to take part in it, is a matter of much difficulty and doubt.¹⁰ It seems to be well settled that the state may impose such regulations as it may see fit, so far as they do not violate the constitutions of the United States or of the state, upon the conduct of insurance within its boundaries, and may prohibit the making of contracts by either natural persons or corporations who have not complied with

⁷ *Newson's Adm'r v. Douglass*, supra; *Fire Ins. Ass'n v. Merchants' & Miners' Transp. Co.*, 66 Md. 339, 7 Atl. 905, 59 Am. Rep. 162; *Ballard v. Insurance Co.*, 9 La. 258, 29 Am. Dec. 444. Where there has been no previous authority the contract can only be ratified by the person who was in the contemplation of the party effecting the insurance. *Buck v. Insurance Co.*, 1 Pet. (U. S.) 151, 7 L. Ed. 90. The policy may be ratified after loss. *Hooper v. Robinson*, 98 U. S. 528, 25 L. Ed. 219. And it has been held that the government may adopt insurance taken out by captors having no insurable interest, and thereby take the benefit of the insurance, although it had not been originally effected for the benefit of the government. *Routh v. Thompson*, 13 East, 274, 284, 285; 1 Arn. Ins. (7th Ed.) 370; *McLaughlin v. Insurance Co. (Com. Pl.)* 20 N. Y. Supp. 536.

⁸ *FARMERS' MUT. INS. CO. v. NEW HOLLAND TURNPIKE CO.*, 122 Pa. 37, 15 Atl. 563; *Mosser v. Donaldson (Pa.)* 10 Atl. 766.

⁹ *Commonwealth v. Vrooman*, 164 Pa. 306, 80 Atl. 217, 25 L. R. A. 250, 44 Am. St. Rep. 603.

¹⁰ "When and how far such power may be legitimately exercised with regard to these subjects must be left for determination to each case as it arises." *Mr. Justice Peckham in Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832.

the requirements that have been imposed.¹¹ But may this power to regulate be extended to prohibit contracts by natural persons, and confine the business of insurance wholly to corporations? Freedom of contract is a constitutional right that should not be lightly interfered with, and it would seem that any statute which takes from an individual his common law right to enter into a contract of insurance would be an unconstitutional interference with the freedom of contract.¹² Yet in some of the states statutes are found prohibiting, and even penalizing, the granting of insurance by any others than corporate insurers; and in a recent case in Pennsylvania the constitutionality of such statutes has been upheld, though in the face of a vigorous dissent.¹³ The ground upon which these statutes are held valid is that the regulation of insurance business is a proper exercise of police power, and that effective control of the business is not possible excepting when it is carried on by corporations whose compliance with the requirements of law can be easily compelled.¹⁴

Strangers Acquire no Rights Under Contract.

Only those between whom the agreement was made are entitled to the rights of parties,¹⁵ excepting, of course, that the beneficiary of the contract may be the real party in interest, and may, as such, enforce the contract.¹⁶ But a stranger cannot thrust himself into the contract, and

¹¹ *Hoadley v. Purifoy*, 107 Ala. 276, 18 South. 220, 30 L. R. A. 351, *State v. Eagle Ins. Co.*, 50 Ohio St. 252, 33 N. E. 1056.

¹² For a discussion of the right of citizens to follow the common occupations of life, see *Butchers' Union Slaughter-House, etc., Co. v. Crescent City Live Stock Landing, etc., Co.*, 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585.

¹³ *Commonwealth v. Vrooman*, supra, *Sterrett, C. J.*, and *Dean and Green, JJ.*, dissenting.

¹⁴ A similar question is raised by statutes restricting the business of banking to corporations. In *State v. Scougal*, 3 S. D. 55, 51 N. W. 858, 15 L. R. A. 477, 44 Am. St. Rep. 756, such a statute was declared unconstitutional. The contrary was held in *State v. Woodmansee*, 1 N. D. 246, 46 N. W. 970, 11 L. R. A. 420.

¹⁵ *Lockwood v. Bishop*, 51 How. Prac. (N. Y.) 221; *North America Life Ins. Co. v. Wilson*, 111 Mass. 542; *Burns v. Grand Lodge*, 153 Mass. 173, 26 N. E. 443, where the policy was sealed; *Stamps v. Insurance Co.*, 77 N. C. 209, 24 Am. Rep. 443; *Martin v. Insurance Co.*, 38 N. J. Law, 140, 20 Am. Rep. 372. But a lessor may sue on a fire policy taken out in her name by the lessee's agent on personal property belonging to her and situated on the leased premises. *Watson v. Insurance Co. (Miss.)* 31 South. 904.

¹⁶ *Munroe v. Association*, 19 R. I. 363, 34 Atl. 149; *Mutual Ben. Life Ins. Co. v. Hillyard*, 37 N. J. Law, 444, 18 Am. Rep. 741. Under the Codes of Procedure the beneficiary may sue as the real party in interest. *Code Civ. Proc. N. Y.* § 111. See *Price v. Insurance Co.*, 17 Minn. 497 (Gil. 473), 10 Am. Rep. 166; *Capital City Ins. Co. v. Jones*, 128 Ala. 361, 30 South. 674, 86 Am. St. Rep. 152; *Lowry v. Insurance Co.*, 75 Miss. 43, 21 South. 664, 37 L. R. A. 779, 65 Am. St. Rep. 587. This is also the rule in Virginia. *Code Va.* 1887, § 2415, construed in *Tilley v. Insurance Co.*, 86 Va. 811, 11 S. E. 120.

make himself a party thereto, by paying premiums or doing other acts as volunteer under the terms of the policy.¹⁷ Neither is the person whose life is insured by another a party to the contract, nor can he, by his own fraud or wrong, affect the rights of the real parties thereunder,¹⁸ nor can he recover moneys that he has improperly paid as premiums on the policy.

The Relation between the Insurer and the Insured.

It has been contended that in the case of mutual companies, and especially with regard to tontine and life endowment policies, the relation of the insurer to the insured is that of trustee. In accordance with this view, efforts have been made by the holders of tontine and endowment policies to require the insurance company to act as a trustee for all sums paid to it as premiums, and to distribute all profits accruing from premium payments and investments ratably among policy holders.¹⁹ This view, however, has received no countenance in the courts, and it can now be regarded as well settled that the true relation existing between the parties to the insurance contract is that of conditional creditor and debtor, being more nearly analogous to that of banker and depositor than to any other that can be instanced.²⁰

WHO MAY BE INSURERS.

- 35. In the absence of statutory regulation, any individual, association, or corporation with adequate powers may become an insurer. It is competent, however, for the state to impose upon all persons granting insurance such conditions as may be deemed necessary for the proper and safe regulation of the business.**

As has already been stated, the legislature has power to fix the competency of the insurer, and to forbid absolutely the making of contracts by any insurer who does not comply with all the regulations imposed, even when such regulations may have the effect of prohibiting the granting of insurance by natural persons.

Statutory Qualifications.

The statutory qualifications required of those engaged in the insurance business are too numerous and varied to be set forth, but it is

¹⁷ Lockwood v. Bishop, *supra*; Leftwich v. Wells, 101 Va. 255, 43 S. E. 364.

¹⁸ North America Life Ins. Co. v. Wilson, *supra*.

¹⁹ Pierce v. Assurance Soc., 145 Mass. 56, 12 N. E. 853, 1 Am. St. Rep. 433; Uhlman v. Insurance Co., 109 N. Y. 421, 17 N. E. 363, 4 Am. St. Rep. 482; Hunton v. Society (C. C.) 45 Fed. 661; Greeff v. Society, 160 N. Y. 19, 54 N. E. 712, 46 L. R. A. 288, 73 Am. St. Rep. 659.

²⁰ Uhlman v. Insurance Co., *supra*. See People v. Security Life Ins. & Annuity Co., 78 N. Y. 114, 34 Am. Rep. 522.

well to call attention to the fact that all such conditions imposed upon the business of insurance are intended for the protection of the public, and that it is perfectly competent for the state to refuse license to do business to any insurer that may fail to comply with such conditions, or to revoke a license already granted, in case of the violation of any such regulation.

Insurers Usually Incorporated.

Even when the statutes do not forbid the making of insurance by natural persons, the conditions of the business itself, requiring permanent existence and certainty of succession in the insurer, have practically taken the business of insurance out of the hands of natural persons and given it over almost exclusively to corporations. Yet certain associations of underwriters, known as "Lloyd's Associations," organized and doing business upon very much the same general principle as the venerable English Lloyd's, are acquiring considerable popularity in fire insurance, and now underwrite a large amount of business.

THE SEVERAL KINDS OF CORPORATE INSURERS.

- 36. Insurance corporations are known as either stock, mixed, or mutual companies, in accordance with the character of the organization of the company.**

The various corporations, in whose hands most of the insurance business of this country now lies, differ very greatly in the nature of their organization and in their charter powers. The different kinds of insurance—fire, life, marine, accident, and guaranty—are usually carried on separately, the charter of insurance corporations generally limiting their powers to granting insurance of one of these several kinds. It is not unusual, however, for a company to be empowered to grant insurance of more than one kind. Thus the same company may issue both fire and marine policies, or another may grant both life and accident insurance. Fire insurance is usually carried on by stock companies, as being best suited for the character of the risk assumed.

Stock Companies.

A stock company is one which possesses some fixed amount of capital stock, owned by shareholders, who constitute the corporation and act through officers selected by them. In the contracts made by stock companies the insured sustains no relation whatever to the insurer, excepting that of contract.

Mutual Companies.

Mutual companies possess ordinarily no capital stock, and are made up of all the policy holders of the corporation, who take the place of stockholders in the ordinary corporation, and act through agencies se-

lected by themselves.²¹ The members of such mutual companies sustain the peculiar double relation of being thus insurers and parties insured; for it is the whole membership of the mutual company which contracts to indemnify each of the members with respect to the loss insured against. No contractual difficulty arises out of this double relation, however, as of course the corporation is essentially a distinct entity from the members of the corporation. The simplest form of mutual company is the assessment company, in which losses suffered by any member are paid by assessments levied upon the whole membership; but, as has heretofore been explained, few mutual companies rely wholly upon assessments, but require fixed premiums to be paid for the purpose of accumulating a fund to assure the performance of their contracts. Stock companies are more apt to be stable, but mutual companies are better adapted for procuring cheap insurance, inasmuch as there is no stock upon which dividends are to be paid. It is to be here noted, however, that while each policy holder in a mutual company is a part of the company and has an interest in its assets, yet he has no right to demand that any ratable proportion of an accumulated surplus shall be paid to him unless such dividend has been declared payable by the directorate or other agency empowered under the charter.²²

Mixed Companies.

Mixed companies are intended to embody the advantages of safety possessed by stock companies and of cheapness that characterizes mutual companies. A small amount of capital stock is furnished by certain shareholders, who, of course, are entitled to have dividends out of the profits, but all policy holders also become members of the corporation, and are entitled to a share in the profits of the company in accordance with the terms of their policies. The best example of a mixed insurance company is the Equitable Life of New York, which possesses a capital stock of \$100,000, but has assets that amount to considerably more than a quarter of a billion.

Mutual Benefit Associations.

The various mutual benefit and benevolent organizations are usually incorporated, and are merely varying forms of the mutual company described above. It should be observed that while the policy holders, or the members holding certificates, are parts of the insuring organization, yet until the contract is completed the applicant is as truly a stranger to

²¹ A mutual insurance corporation is not a partnership to be dissolved when its policy holders reside in different states that become involved in war. *Cohen v. Insurance Co.*, 50 N. Y. 610, 10 Am. Rep. 522; *Mutual Ben. Life Ins. Co. v. Hillyard*, 37 N. J. Law, 444, 18 Am. Rep. 741. But see *Kruh v. Insurance Co.*, 77 Pa. 15.

²² *Greeff v. Society*, 160 N. Y. 19, 54 N. E. 712, 46 L. R. A. 288, 73 Am. St. Rep. 659.

the mutual organization as he would be if application were made to any other kind of corporate insurer.²³ He is, therefore, not charged with assent to, or acquiescence in, any hidden rules or regulations for the conduct of the business, which are presumptively known to all those who are actually members.²⁴

Corporate Insurers Act through Agents.

The principles governing the rights of the parties to the insurance contract are much complicated by reason of the necessity that exists for all corporate insurers to carry on their business by means of agents. This brings into the law of insurance, as a complicating factor, the whole law of agency. Furthermore, the questions of agency that arise are of especial difficulty, by reason of the peculiar character of the insurance contract, and the efforts made by insurance companies to secure by means of terms written in their policies all the benefits that may be derived from carrying on business by representatives without any of the usually accompanying burdens of so doing. This general subject of insurance agents and their powers will, therefore, require a full and careful treatment, which will be reserved for a subsequent chapter.²⁵

THE RIGHTS OF FOREIGN INSURERS.

37. Under the Constitution of the United States any citizen or association of citizens of one state has the same right to make contracts of insurance in another state as have the citizens of that state.

38. But corporate insurers are not citizens within the meaning of this clause, and may therefore exercise their corporate powers outside of the states by which they are chartered only by license from the foreign state. States may therefore totally exclude foreign insurance corporations, or may admit them on such cen-

²³ *Ellenberger v. Insurance Co.*, 89 Pa. 464; *Supreme Lodge A. O. U. W. v. Hutchinson*, 6 Ind. App. 399, 33 N. E. 816; See *Susquehanna Ins. Co. v. Perrine*, 7 Watts & S. (Pa.) 348. And see dictum in *KANSAL v. ASSOCIATION*, 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776, 778.

²⁴ Thus, a provision of the constitution that the statements in the application shall be deemed warranties will not be effective, since the applicant is not yet a member. *Supreme Lodge A. O. U. W. v. Hutchinson*, supra; and a rule limiting the agent's authority does not affect an applicant without notice. *Lycoming Fire Ins. Co. v. Woodworth*, 83 Pa. 223. In Massachusetts the rule is otherwise, and it is held that officers and agents have no power to waive by-laws that relate to the substance of the contract. A by-law requiring prepayment of premium, or one providing that only persons between certain ages may become members, cannot be waived. *Baxter v. Insurance Co.*, 1 Allen, 294, 79 Am. Dec. 730. See, also, *Mulrey v. Insurance Co.*, 4 Allen, 116, 81 Am. Dec. 689; *McCoy v. Insurance Co.*, 152 Mass. 272, 25 N. E. 239.

²⁵ See post chap. IX.

ditions as they may see fit to impose, whether such conditions be reasonable or unreasonable. A license to do business once granted may be revoked with or without cause. And the reason for such revocation of license is not a proper subject for judicial inquiry.

In order to promote commercial relations between the several states and the citizens thereof, the constitution of the United States makes provision that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."²⁶ Under this provision no state may impose upon the citizens of another state engaged in insurance any conditions or restrictions to which its own citizens are not subject. Of course, however, the citizens of each state are required to comply as fully with all the statutory requirements of other states in which they desire to do business as insurers as are the citizens of those states.

Lloyd's Associations.

Under the general doctrine just stated, much difficulty has been experienced in determining what is the status of the unincorporated associations known as "Lloyd's Associations," which appear to be growing in popular favor, and write a very considerable amount of insurance throughout the Union. These are associations of a large number of insurance brokers, who enter into a joint agreement for the more efficient and extensive conduct of insurance business. There is a common guarantee fund to which each member contributes, a single form of policy running in the name of the association, and a central managing body to which all premiums are paid, and by whom losses are settled. The members, however, have none of the restricted liability of stockholders of a corporation, but are individually liable for the debts of the association. These associations have a central office in some large city, and send their agents into many different states to solicit business. The effort has been made in some states to subject the business of these associations to the same conditions and restrictions that are imposed upon the business of foreign insurance corporations. The statute of Ohio particularly specifies that any partnership or association "acting as a corporation" shall be required to comply with all the requirements that are made for insurance corporations. This statute has been declared constitutional by the Court of Appeals of Ohio in the recent case of *State v. Ackerman*.²⁷ In other states, however, it has been lately decided that such associations cannot be required to comply with any other conditions than such as are imposed upon domestic insurers.²⁸

²⁶ Article IV, § 2, c. 1.

²⁷ *STATE v. ACKERMAN*, 51 Ohio St. 163, 37 N. E. 828, 24 L. R. A. 298. See, also, *Greene v. People* (Ill. Sup.) 21 N. E. 605.

²⁸ *State v. Board of Insurance Com'rs*, 37 Fla. 564, 20 South. 772, 33 L.

This latter view would seem to be manifestly correct. While it is true that such an association does, in a sense, act as a corporation, yet it is plain that it is not a corporation, but merely a number of citizens of another state associated for the purpose of conducting a certain joint enterprise. Although associated, they do not, in any sense, lose their characters as citizens by reason of being engaged in a joint enterprise; and it would seem, therefore, a denial to them of the privileges and immunities of citizenship to place upon them the same restrictions as are imposed upon corporations.

Foreign Insurance Corporations.

It is now settled beyond controversy that a corporation is not a citizen of the state by the laws of which it is chartered, within the meaning of that clause of the Constitution of the United States which has been quoted above,²⁹ although it is recognized as a citizen for jurisdictional purposes.³⁰ Therefore, not being a citizen entitled to all the privileges and immunities of a citizen in the several states, the corporation has no right whatsoever to do business in a foreign state, except by the permission of that state.³¹ It has been laid down in the leading case of *Paul v. Virginia*,³² and repeatedly reaffirmed, that insurance is not commerce, within the meaning of that clause of the Constitution of the United States which protects interstate commerce from state intervention.³³ It therefore follows that any state may, at its option, totally

R. A. 288; *Barnes v. People*, 168 Ill. 425, 48 N. E. 91. The Missouri statute makes no discriminations against foreign insurers, and was held valid in *State v. Stone*, 118 Mo. 388, 24 S. W. 164, 25 L. R. A. 243, 40 Am. St. Rep. 388. In *Noble v. Mitchell*, 164 U. S. 367, 17 Sup. Ct. 110, 41 L. Ed. 472, affirming same case, 100 Ala. 519, 14 South. 581, 25 L. R. A. 238, it was stated obiter that such a statutory prohibition applying to "every company, corporation, association, or partnership organized for the purpose of transacting the business of insurance" was void.

²⁹ *Paul v. Virginia*, 8 Wall. (U. S.) 168, 19 L. Ed. 357; *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297.

³⁰ *Shaw v. Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; *Baltimore & O. R. Co. v. Harris*, 12 Wall. (U. S.) 65, 20 L. Ed. 354; *Clark, Corp.* 75.

³¹ *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519, 10 L. Ed. 274; 16 Am. & Eng. Enc. Law, 897; *Daggs v. Insurance Co.*, 136 Mo. 382, 38 S. W. 85, 35 L. R. A. 227, 58 Am. St. Rep. 638, affirming *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552; *Clark, Corp.* 615. A state may prohibit and punish the soliciting, within the state, of contracts of insurance in unlicensed foreign companies. *Nutting v. Massachusetts*, 183 U. S. 553, 22 Sup. Ct. 238, 46 L. Ed. 324, affirming *Commonwealth v. Nutting*, 175 Mass. 154, 55 N. E. 895, 78 Am. St. Rep. 483; *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297. But a state cannot punish its citizens for making a contract outside the state. *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832.

³² 8 Wall. (U. S.) 168, 19 L. Ed. 357.

³³ *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297, in which the previous cases are cited. This was a case of marine insurance.

exclude any or all foreign insurance corporations from doing business within its borders, or it may admit them upon such conditions as it sees fit to impose. These conditions may be reasonable or unreasonable, just or unjust; all are equally conclusive upon a foreign corporation. It is in its option either to decline to enter the state, or, upon entering, to comply with all the conditions imposed upon its admission. Accordingly the character of these conditions is not a subject of legal concern to such foreign corporations, or of judicial investigation by the courts.

It follows, therefore, from what has been said above, that, inasmuch as the granting of license to do business to foreign corporations is plainly at the option of the state, the license once granted may be revoked at the pleasure of the state, with or without cause.³⁴ This right of the state to revoke a license once granted extends so far that, although a condition imposed upon foreign insurers as precedent to their admission into the state is unconstitutional, yet upon the breach of such a condition by the foreign insurer the state is at perfect liberty to revoke the license granted.³⁵

Removal of Causes by Foreign Insurance Corporations.

The most striking illustration of this last principle is found in the condition imposed by many of the states in the American Union upon foreign corporate insurers, that before engaging in business in such states the insurer shall enter into an agreement that it will not remove causes to which it may be a party to the federal courts.³⁶ Such an agreement is manifestly unconstitutional and void, inasmuch as it deprives the insurer of a right guaranteed to it under the Constitution of the United States.³⁷ The insurer, therefore, is in no respect bound by his agreement to refrain from resorting to a federal court whenever that court has jurisdiction; but in case this illegal agreement is broken by the insurer the state cannot be prevented from promptly revoking the license, which was conditioned upon the faithful performance of that agreement. This conclusion follows necessarily from the revocable character of the license, and has been laid down in unmistakable terms

³⁴ Clark, Corp. 618, citing *Doyle v. Insurance Co.*, 94 U. S. 535, 24 L. Ed. 148.

³⁵ *Doyle v. Insurance Co.*, 94 U. S. 535, 24 L. Ed. 148.

³⁶ *Home Ins. Co. v. Davis*, 29 Mich. 238; *Morse v. Insurance Co.*, 30 Wis. 496, 11 Am. Rep. 580, reversed *Home Ins. Co. of New York v. Morse*, 20 Wall. (U. S.) 445, 22 L. Ed. 365.

³⁷ *Home Ins. Co. of New York v. Morse*, 20 Wall. (U. S.) 445, 22 L. Ed. 365, wherein it was held that the corporation could, notwithstanding the statute, remove a suit to the federal courts. *Barron v. Burnside*, 121 U. S. 186, 7 Sup. Ct. 931, 30 L. Ed. 915, which holds that the agent of the corporation cannot be punished for violating such statute.

by the Supreme Court of the United States in the case of *Doyle v. Continental Ins. Co. of New York*.³⁸

A closely related doctrine, which is apparently repugnant to that which has just been stated, should here be noted. When a statute requires foreign corporations to relinquish their constitutional right to resort to the federal courts as a condition to obtaining a license to do business, such statute is unconstitutional, and it therefore follows that a penalty imposed in that state upon persons doing business on behalf of such foreign corporations without license is void and unenforceable. This principle, however, is declared by the Supreme Court of the United States in *Barron v. Burnside*³⁹ not to be in conflict with the previous holding of that court in *Doyle v. Continental Ins. Co. of New York*.⁴⁰ The latter case involved merely the right of the state to revoke a license by reason of the breach of an agreement which was illegal, while the former involved a prosecution under the statute imposing such illegal condition.

CONTRACTS MADE BY INSURERS NOT COMPLYING WITH STATUTORY REQUIREMENTS.

39. Whether contracts of unlicensed foreign insurance corporations, which by statute are prohibited or declared unlawful, are valid, void, or voidable, depends upon the intention of the legislature as expressed in each particular statute. The following rules, however, are useful in determining the proper construction of any statute in question:
- (a) When the contract is expressly declared void, neither party can take any rights thereunder.
 - (b) When the statute expressly validates the contract despite the noncompliance of the insurer, it is enforceable as to both parties.
 - (c) When the contract is merely prohibited by the statute, such contract is void, but may nevertheless be enforced against the delinquent insurer, who is estopped to plead in defense his own infraction of law.
 - (d) When a penalty is imposed upon the insurer for doing business in violation of the statute, such penalty should be deemed exclusive, and the contracts held valid. But by many authorities such policies are held unenforceable against the insured.

Much confusion exists in the authorities, both text-books and judicial decisions, as to the validity of contracts made by a foreign insurer who has not complied with the statutory requirements of the state in which the contract is made. Much of the conflict is only apparent, on

³⁸ 94 U. S. 535, 24 L. Ed. 148.

³⁹ 121 U. S. 186, 7 Sup. Ct. 931, 30 L. Ed. 915.

⁴⁰ *Supra*.

account of the great variation that exists between the statutes of the several states under which the cases have arisen. Whether a contract made in violation of any of these statutes is valid, void, or voidable, will, of course, depend altogether upon the intention of the legislature in enacting the statute. This intention must be discovered from the act itself, construed with reference to the circumstance of its enactment. Where the expression makes the intention doubtful, the court may look to the purposes of the enactment and to other circumstances connected with it that will tend to show what is the real intent of the legislature. But if the statute is clear in its expressed meaning, the intent must be conclusively deemed that which is expressed by the words of the act, and no other intent repugnant to the one set forth in the words of the statute can be shown. Therefore, the determination of the question whether the contract is valid or not is merely a matter of construction. In determining, however, the proper construction to be given to these statutes, certain general rules may be laid down to serve as guiding principles.

In many states ⁴¹ it is expressly enacted that contracts made without compliance with the statutory requirements by the insurer shall nevertheless be valid and enforceable. Under such statutes there can, of course, be no question as to the right of either of the parties to enforce the contract against the other. In still other states ⁴² it is expressly declared that the contracts made in violation of the statutes shall be void. These statutes are equally clear in meaning, and neither party can take any rights under the contract.

When, however, the statutes imposing conditions upon doing business by the foreign insurer merely prohibit the making of the contract without compliance with their terms, the question as to the rights of the parties becomes of much greater difficulty. In accordance with the general rule ⁴³ that a contract that is prohibited is illegal, and therefore void, it would follow that neither one of the parties would take any rights under the contract, or could enforce the agreement against the other. Yet to apply this general doctrine to a contract made under such circumstances as usually attend the making of a contract of insurance would work great hardship, and be manifestly unjust. The party insured cannot without great difficulty discover whether the insurer has complied with all the statutory requirements or not; and while it is true that the statutes imposing these conditions upon the insurer are

⁴¹ Where a statute declares policy valid notwithstanding noncompliance with law, premium notes and assessments thereon are collectible. *Commonwealth Mut. Fire Ins. Co. v. Place*, 21 R. I. 248, 43 Atl. 68. See *Code Va.* 1887, § 1269.

⁴² Where a statute declares policy void it is unenforceable by either party. *Wood v. Insurance Co.*, 8 Wash. 427, 36 Pac. 267, 40 Am. St. Rep. 917.

⁴³ See *Clark, Cont.* (2d Ed.) p. 255 et seq.

public acts, and therefore presumed to be known to all, yet it would be unreasonable to require that every person to whom a corporate insurer offers a contract of insurance should make an exhaustive investigation in order to discover whether his co-contractor has been fully qualified to make the agreement that is proposed, which is a question of fact. It would seem that the insured has a right to presume that the insurer has complied with all the requirements of law. Accordingly, it is held by the great weight of authority that when the insured attempts to enforce such a contract, made in good faith, against the unlicensed insurer, the latter will be estopped to escape liability under the contract by pleading his own infraction of law.⁴⁴

The same principle of estoppel, however, does not apply when the insurer is endeavoring to enforce some right under the contract against the insured.⁴⁵ The plaintiff, not having legally qualified himself to make the contract under which he sues, has no standing in law or equity when he attempts to enforce it.

A fourth class of cases is found to arise when the act setting forth the requirements of foreign corporations for doing business within a state

⁴⁴ *Clark, Corp.* 628. See opinion of Caldwell, J., in *Berry v. Indemnity Co.* (C. C.) 46 Fed. 439; *Watertown Fire Ins. Co. v. Rust*, 141 Ill. 85, 30 N. E. 772; *State Mut. Fire Ins. Ass'n v. Brinkley Stave & Heading Co.*, 61 Ark. 1, 31 S. W. 157, 29 L. R. A. 712, 54 Am. St. Rep. 191; *Swan v. Insurance Co.*, 96 Pa. 37; *Hartford Live Stock Ins. Co. v. Matthews*, 102 Mass. 221.

⁴⁵ Where a statute prohibits the transaction of business by foreign insurance companies in a state unless certain prescribed conditions have been complied with, contracts made in violation of such statute are unenforceable by the insurer. *Cincinnati Mut. Health Assur. Co. v. Rosenthal*, 55 Ill. 85, 8 Am. Rep. 626; *Seamans v. Temple Co.*, 105 Mich. 400, 63 N. W. 408, 28 L. R. A. 430, 55 Am. St. Rep. 457; *Cowan v. Assurance Corp.*, 73 Miss. 321, 19 South. 298, 55 Am. St. Rep. 535; *Rose v. Clark Co.*, 89 Wis. 545, 62 N. W. 526, 27 L. R. A. 556, 46 Am. St. Rep. 855 (to recover an assessment); *Haverhill Ins. Co. v. Prescott*, 42 N. H. 547, 80 Am. Dec. 123 (on the ground that the policy was invalid, and hence no consideration for the premium note. The next year (1862) a statute was passed making policies issued by foreign companies that had not complied with the statutes valid against the insurer, and in *Union Ins. Co. v. Smart*, 60 N. H. 460, it was held that the premium note was also valid, for the reason that "otherwise there would be no consideration for the policy"). *Williams v. Cheney*, 8 Gray (Mass.) 206; *Phoenix Ins. Co. v. Pennsylvania R. Co.* (Ind.) 33 N. E. 970, 20 L. R. A. 405 (dictum to the effect that the right of the insurer to enforce the contract is suspended until compliance with the statute, and citing the conflicting Indiana cases. This dictum is supported by *Walter A. Wood Mowing & Reaping Mach. Co. v. Caldwell*, 54 Ind. 270, 23 Am. Rep. 641; *Singer Mfg. Co. v. Brown*, 64 Ind. 548; *Stewart v. Insurance Co.*, 38 N. J. Law, 436; *Aetna Ins. Co. v. Harvey*, 11 Wis. 394; *Buell v. Grain Co.*, 65 Ill. App. 271; *Beeber v. Walton* (Del. Super.) 32 Atl. 777; *Commonwealth Mut. Fire Ins. Co. v. Hayden*, 60 Neb. 636, 83 N. W. 922, 83 Am. St. Rep. 545; *People's Mut. Ben. Soc. v. Lester*, 105 Mich. 716, 63 N. W. 977; *Swing v. Munson*, 191 Pa. 582, 43 Atl. 342, 58 L. R. A. 223, 71 Am. St. Rep. 772.

merely imposes a penalty upon the insurer, or upon his agent acting in his behalf, in case he carries on insurance business in violation of the terms of the statute. Many of the authorities⁴⁶ hold that the same rule of law applies in this case as in the preceding; that is, that such a contract cannot be enforced against the insured, but is binding upon the insurer. But on principle and the better reasoned authority, it would seem that the imposing of a penalty without direct prohibition would show an intent on the part of the legislature to enforce the law by means of the penalty designated. The court ordinarily holds void a prohibited contract, because otherwise the law that forbids such contracts could not be enforced. But where a provision is made for enforcing the law by a distinct penalty imposed, such penalty would seem to be exclusive, and to rebut the presumption that the additional penalty of declaring the contract void was intended to be laid. Therefore it has been held, and properly so, that such contracts of insurance as are merely penalized, and not prohibited, are valid and enforceable by both parties.⁴⁷

WHO MAY BE INSURED.

40. In order that a person may be the party insured in an insurance contract, two essential requisites must exist:

- (a) The person must be competent to make a contract;
- (b) He must possess an insurable interest in the subject of the insurance.

Ordinarily no restrictions are placed upon the right of any natural person sui juris, or any corporation possessing adequate powers, to protect any valuable interest he may have from loss or injury by reason of any peril to which it may be exposed. Indeed it may be safely said that the right of a citizen thus to protect himself against loss falls within that class of inherent and inalienable rights which are guaranteed under the federal Constitution.⁴⁸ Accordingly, any statute unreason-

⁴⁶ Where the statute prohibits and penalizes, the policy is void as against the insured. *Thorne v. Insurance Co.*, 80 Pa. 15, 21 Am. Rep. 89; *Cincinnati Mut. Health Assur. Co. v. Rosenthal*, supra; *Seamans v. Temple Co.*, supra.

⁴⁷ The mere imposition of a penalty for the transaction of business without compliance with the statutory requirements will not render the contract of insurance invalid. *Pennypacker v. Insurance Co.*, 80 Iowa, 56, 45 N. W. 408, 8 L. R. A. 236, 20 Am. St. Rep. 395; *Toledo Tie & Lumber Co. v. Thomas*, 33 W. Va. 566, 11 S. E. 37, 25 Am. St. Rep. 925 (on the ground that the penalty imposed included all others); *Union Mut. Life Ins. Co. v. McMillen*, 24 Ohio St. 67; *State Mut. Fire Ins. Ass'n v. Brinkly Stave & Heading Co.*, 61 Ark. 1, 31 S. W. 157, 29 L. R. A. 712, 54 Am. St. Rep. 191. See *Fritts v. Palmer*, 132 U. S. 282, 10 Sup. Ct. 93, 33 L. Ed. 317; *Clark, Corp.* 627.

⁴⁸ *Butchers' Union Slaughter-House, etc., Co. v. Crescent City Live Stock Landing, etc., Co.*, 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585.

ably restricting this right, or interfering with its enjoyment, is unconstitutional and void.⁴⁹

It is necessarily true that a person whom the law deems incapable of binding himself by the contractual bond cannot become a party to a contract of insurance. Therefore a married woman at common law, an alien enemy, and an adjudged lunatic, are wholly incapable of becoming parties insured.⁵⁰ But other incompetent persons, such as infants, persons non compotes mentis, but not judicially declared insane, and drunken persons, are not prohibited by the law from entering into contracts, but merely protected from the evil consequences of any unwise agreements they may have made, and left free to enjoy any benefit that may be derived from the enforcement of the contract against the adult party. The rights arising under a contract to which the party insured is incompetent at the time of making the contract, or becomes so thereafter, require, therefore, especial examination.

Insured Must Possess an Insurable Interest.

As has been shown heretofore, the presence of an insurable interest in the party insured changes the spirit of the contract from one that courts chance to one that defies chance; it transforms a gambling contract peculiarly injurious to the public morals and safety into a beneficent arrangement for sharing misfortune, and a common bearing of burdens that averts individual disaster and encourages industry and enterprise. The doctrine of insurable interest is seen, therefore, to lie deep at the basis of public policy, and is maintained by the courts with that jealous care which its importance justifies. The subject is treated fully in the next succeeding chapter.

INFANTS AS PARTIES INSURED.

41. While not a contract for necessities, the insurance contract is one that may properly be made by an infant, and, when made, is valid until disaffirmed by the infant. By the weight of authority and the better reason the infant, upon disaffirmance, cannot recover the premiums paid, provided the contract has been fairly made.

There are many conditions under which it is provident and wise for an infant to insure his property or his life, and any rule of law which would prevent his doing so would be hurtful in its effect and a grave discouragement to the enterprise of infants. Accordingly, it is uniformly held that an infant's contract of insurance is perfectly valid until disaffirmed by the infant or his representative.⁵¹ This right of disaf-

⁴⁹ *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832.

⁵⁰ *Clark, Cont.* 212 et seq.

⁵¹ *Monaghan v. Insurance Co.*, 53 Mich. 238, 18 N. W. 797; *JOHNSON*

firmance, however, is personal to the infant, and cannot be exercised by the adult insurer. The latter cannot escape liability under the policy by pleading the infancy of the insured, on the ground that the contract lacks mutuality.⁵²

An interesting phase of this same doctrine arises in connection with contracts made between an infant member of a mutual benefit association and the association. The purposes for which these associations are chartered require entire mutuality in the relations between the members, both as to benefits and to burdens, and in a case recently decided in New York it was held that inasmuch as the infant could not make a contract that was mutually binding, since it could be avoided by the infant at will, such a contract was not within the contemplation of the charter of the association, and was, therefore, void.⁵³ This holding, however, cannot be regarded as correct, since an infant's contract is binding until disaffirmed. And in any event the contract of the mutual benefit association with its member is to a certain extent unilateral, since the agreement of the member to pay assessments levied can usually be enforced only by his expulsion from the association and his forfeiture of any rights that may have attached to his membership. Therefore the association has exactly the same remedy against the infant member as against the adult, and it has accordingly been properly held by other courts that such a contract with an infant is merely voidable, as other infants' contracts, and may properly be made by such an association.⁵⁴

It would seem to be a principle too manifestly true to need the support of authority or argument, that an infant party insured must either affirm or disaffirm his contract in toto. Every consideration of reason and justice would be disregarded if he were allowed to affirm such terms of the policy as are beneficial and disaffirm those that are found burdensome. Yet it has been held in *O'Rourke v. John Hancock Mut. Life Ins. Co.*,⁵⁵ recently decided by the Supreme Court of Rhode Island, that breach of warranty affords no defense in a suit brought upon a policy of insurance granted to an infant, on the ground that to allow such defense would, in effect, be permitting the insurer by a sort of cross-action to enforce the warranty against the infant, which, as the

v. INSURANCE CO., 56 Minn. 365, 57 N. W. 934, 26 L. R. A. 187, 45 Am. St. Rep. 473; *Union Cent. L. Ins. Co. v. Hilliard*, 63 Ohio St. 478, 59 N. E. 230, 53 L. R. A. 462, 81 Am. St. Rep. 644. This case also holds that the infant's assignment of the policy is only voidable.

⁵² *Monaghan v. Insurance Co.*, supra.

⁵³ *In re GLOBE MUT. BEN. ASS'N*, 135 N. Y. 290, 32 N. E. 122, 17 L. R. A. 547, reported below in 63 Hun, 263, 17 N. Y. Supp. 852. See, also, *Commonwealth v. People's Mut. Life & Relief Ass'n*, 6 Pa. Dist. R. 561.

⁵⁴ *Chicago Mut. Life Indemnity Ass'n v. Hunt*, 127 Ill. 257, 20 N. E. 55, 2 L. R. A. 549. See *Nibl. Ben. Soc. & Acc. Ins.* pp. 74, 228, 290.

⁵⁵ 23 R. I. 437, 50 Atl. 834, 57 L. R. A. 496, 91 Am. St. Rep. 643.

court shows, cannot be done. The fallacy in the reasoning of the court consists in confusing the cases in which the adult is attempting affirmatively to enforce the contract against the infant defendant, and those in which the adult defendant sets up in defense a condition that forms an integral part of the contract which the infant, or his representative, is endeavoring to enforce. Stiness, C. J., in the course of his opinion in the case, says: "The question, therefore, is whether an infant is bound by his warranties in a contract of insurance. In considering it we have not the advantage of weighing the reasons given in previous decisions, for we have been unable to find a case like this reported." It is to be regretted that a case of first impression involving a matter so important in the commercial world should have been so decided, and it is to be hoped that it will not be followed. If it is the law that an infant or his representative may repudiate such of the conditions of a policy as the insurer inserts for his protection, and enforce only those that are beneficial to him, the effect will be to preclude insurers from contracting with infants, and thus work a great hardship upon the latter in depriving them of the protection of insurance.

However beneficial insurance may be to the infant's estate, or however needful it may be to the successful conduct of his business, the contract of insurance is not a contract for necessities⁵⁶ in the technical sense in which the term is used in the law of infants' contracts. The infant may accordingly, upon repudiating the contract, recover the consideration given, in accordance with the general rule of law applying in such cases.

There is one phase, however, of the general doctrine touching the infant's rights upon disaffirmance which is of peculiar interest and importance in the case of insurance contracts. Has the infant insured the right, after enjoying for several years the protection afforded under his policy, upon attaining his majority, to repudiate his contract and recover from the insurer the premiums he has paid? Here the infant has received for the premiums a valuable consideration—protection—which, in the nature of things, he cannot restore. The question thus reduces itself to the more general inquiry whether an infant, upon disaffirming an executed contract, can recover the cash consideration given when restitution of that received has become impossible. The English cases hold that he cannot,⁵⁷ but it seems that the weight of American authority is opposed to the English view.⁵⁸ It has recently been held in Minnesota⁵⁹ that when a life insurance contract had been fairly made by a solvent insurer with an infant, the latter could not

⁵⁶ *New Hampshire Mut. Fire Ins. Co. v. Noyes*, 32 N. H. 345.

⁵⁷ *Holmes v. Blogg*, 8 Taunt. 508. See 1 Para. Cont. 322.

⁵⁸ *Clark*, Cont. (2d Ed.) 171 et seq.

⁵⁹ *JOHNSON v. INSURANCE CO.*, 56 Minn. 365, 59 N. W. 992, 26 L. R. A. 187, 45 Am. St. Rep. 473.

upon disaffirmance recover the premiums paid. It was further held that the burden of proving the fairness of the contract lay upon the insurer. This decision seems eminently sound, though it is doubtful if it is in accord with the weight of authority, to be derived from analogous cases in the United States.

It is clear, however, that the premiums required in ordinary level premium life insurance more than pay for the current protection afforded.⁶⁰ They go to swell the reserve fund that must be accumulated for each policy. Therefore so much of the infant's premiums as have been carried to the reserve fund, or, in other words, the reserve value of the infant's policy, should be returned to him upon disaffirmance. In *Johnson v. Insurance Co.*,⁶¹ referred to above, this principle was recognized, although the decision is erroneous in allowing the recovery of the "surrender" value only. The surrender value, which is always fixed at a smaller sum than the true or reserve value, can be recovered by an adult, in accordance with the terms of the contract. The infant should have the higher privilege of recovering the real, rather than the contract, value of his policy.

ALIENS AS PARTIES INSURED.

42. In all civilized countries the right of alien friends to contract for insurance is unrestricted. The contract made with an alien enemy is void.

43. WAR INTERVENING—There is much conflict of authority as to the effect of the intervention of war, causing the parties to a valid insurance contract to become alien enemies; but, by the better rule, the policy is avoided, and not merely suspended.

The liberal rules of law now prevailing in all civilized countries with regard to the rights and privileges accorded alien friends have resulted in the frequent making of contracts of insurance between citizens of different countries. One of the large American life companies advertises that it does business in some eighty-four different countries. These international contracts are valid and enforceable.⁶² The existence of war between two countries, however, necessarily interdicts all commercial intercourse between the citizens of the belligerent states, and renders void any contracts of insurance, as well as other contracts, that may be made between subjects of the warring governments.

⁶⁰ *NEW YORK LIFE INS. CO. v. STATHAM*, 93 U. S. 24, 23 L. Ed. 789; *Cohen v. Insurance Co.*, 50 N. Y. 610, 10 Am. Rep. 522.

⁶¹ 56 Minn. 365, 59 N. W. 992, 26 L. R. A. 189, 45 Am. St. Rep. 473. See original opinion, 56 Minn. 365, 57 N. W. 934, 26 L. R. A. 187.

⁶² *Clark, Cont.* (2d Ed.) 146.

A difficult question arises, however, when it becomes necessary to determine the rights of parties under a policy issued in time of peace by a citizen of one state to a citizen of another when a war intervenes. All intercourse between the parties necessarily ceases, and the payment of premiums and the performance of other conditions of the policy become impossible.⁶³ In the case of an ordinary fire policy, which grants insurance only from year to year, or for some other specified term, it is plain that when the parties become alien enemies the contractual tie is broken, and the contractual rights of the parties, so far as not vested, lost. But the contract of life insurance is peculiar, and involves other than the simple principles just stated as governing in fire insurance. Annual premiums paid in life insurance represent something more than the consideration for the insurance for each successive year. They are partly set aside to form a fund, known as the policy reserve, which is held in quasi trust by the insurer until such time as the policy matures, and the sum specified therein becomes payable. This reserve value fixes the liability of the insolvent insurer upon an outstanding policy at any given time,⁶⁴ and is in the nature of a vested right, which may be defeated by nonperformance of a condition subsequent, such as the nonpayment of premiums when due.⁶⁵

In determining the effect of war upon the rights of parties to existing contracts, the courts have fallen into great confusion and conflict. The cases, however, fall into three groups, according as they support what, for the sake of convenience, will be called the Connecticut, the New York, and the United States Rules.

The Connecticut Rule.

In Connecticut and a few other states it has been held that the intervention of war absolutely terminates all rights under the contract.⁶⁶ These courts base their decisions upon the view that there are two elements in the consideration for which the annual premium is paid—First, the mere protection for the year, and, second, the privilege of renewing the contract for each succeeding year by paying the premium for that year at the time agreed upon. According to this view of the contract, the payment of premiums is a condition precedent, the nonperformance of which, even when performance would be illegal, necessarily defeats the right to renew the contract.

⁶³ *Kershaw v. Kelsey*, 100 Mass. 561, 97 Am. Dec. 124, 1 Am. Rep. 142; *Wheat. Int. Law* (Lawr. Ed.) 551.

⁶⁴ *Universal Life Ins. Co. v. Binford*, 76 Va. 103.

⁶⁵ *Sands v. Insurance Co.*, 50 N. Y. 626, 10 Am. Rep. 535.

⁶⁶ *Worthington v. Insurance Co.*, 41 Conn. 372, 19 Am. Rep. 495; *Dillard v. Insurance Co.*, 44 Ga. 119, 9 Am. Rep. 167; *Tait v. Insurance Co.* (U. S. Cir. Ct.) 4 Bigelow, Cas. 479, note, Fed. Cas. No. 13,728.

The New York Rule.

By far the greater number of decisions hold that war between states in which the parties reside merely suspends the contract of life insurance, and that, upon tender of all premiums due by the insured or his representative after the war has terminated, the contract revives and becomes fully operative.⁶⁷ Thus, one Atwood, at the time of the outbreak of the Civil War a resident of Virginia, had paid all premiums due on a policy issued by a New Jersey insurance company down to December, 1861, when a premium falling due could not be paid on account of the war. Atwood died in 1862. The policy contained the usual conditions of forfeiture upon nonpayment of any premium when due. Upon the restoration of peace, Atwood's administratrix tendered the unpaid premium, and demanded payment under the policy. The Virginia court held that the policy had been revived, and compelled the insurer to make payment in accordance with its terms.⁶⁸

The reasons given for this doctrine of resuscitation are divers, but the general theory of the holding is that life insurance is not such a continuous contract as is terminated ipso facto by war,⁶⁹ but is an entire contract, in which the insured has certain vested rights; that the condition avoiding the contract upon nonpayment of premiums is not a condition precedent, but a condition subsequent, defeating rights already vested; and when such condition becomes impossible of performance, nonperformance will be excused, since the law does not favor forfeiture.

The United States Rule.

The question came before the Supreme Court of the United States in 1876, in *New York Life Ins. Co. v. Statham*,⁷⁰ and several companion cases, and was decided by a divided court. The rather unsatisfactory opinion by Mr. Justice Bradley accords with the New York doctrine in holding that the contract is entire, and not from year to year, and that the condition as to payment of premiums is subsequent, and not precedent. It denies, however, that the contract

⁶⁷ *Cohen v. Insurance Co.*, 50 N. Y. 610, 10 Am. Rep. 522; *Sands v. Insurance Co.*, 50 N. Y. 626, 10 Am. Rep. 535; *Manhattan Life Ins. Co. v. Warwick*, 20 Grat. (Va.) 614, 3 Am. Rep. 218; *Mutual Ben. Life Ins. Co. v. Atwood's Adm'r*, 24 Grat. (Va.) 497, 18 Am. Rep. 652; *New York Life Ins. Co. v. Hendren*, 24 Grat. (Va.) 536; *Clemmitt v. Insurance Co.*, 76 Va. 355; *Mutual Ben. Life Ins. Co. v. Hillyard*, 37 N. J. Law. 444, 18 Am. Rep. 741; *New York Life Ins. Co. v. Clopton*, 7 Bush (Ky.) 179, 3 Am. Rep. 290; *Statham v. Insurance Co.*, 45 Miss. 581, 7 Am. Rep. 737.

⁶⁸ *Mutual Ben. Life Ins. Co. v. Atwood's Adm'r*, 24 Grat. 497, 18 Am. Rep. 652.

⁶⁹ See *Sands v. Insurance Co.*, *supra*.

⁷⁰ *NEW YORK LIFE INS. CO. v. STATHAM*, 93 U. S. 24, 23 L. Ed. 789.

is merely suspended, and declares it abrogated by reason of the nonpayment of premiums, since the time of the payments is peculiarly of the essence of the contract. Nor will equity relieve from the forfeiture due to the nonperformance of the impossible condition subsequent, since to do so would work injustice to the insurer, inasmuch as the insurer and insured are not on an equal footing in the premises. The payment of the past due premiums and the revival of the policy is wholly at the option of the insured. The insurer has absolutely no means of compelling the revival of all suspended policies, and it is reasonable to suppose that the option to revive, by payment of the premiums due, will be exercised only in those cases where the insured is already dead, or in such bad health as will preclude his securing a new policy.

Accordingly it was held that the policy was extinguished by the nonpayment of the premiums, and that no action would lie for the amount of insurance specified therein. But it was further decided that it would be also unjust to allow the insurer to retain the reserve value of the policy, which is the excess of the premiums paid over the actual risk carried during the years when the policy had been in force. "To forfeit this excess, which fairly belongs to the assured, and is fairly due from the company, and which the latter actually has in its coffers, and to do this for a cause beyond individual control, would be rank injustice. It would be taking away from the assured that which had already become substantially his property." Therefore the insured was held entitled to recover the "equitable value" of his policy at the time of the forfeiture. This equitable value is defined as the difference between the cost of a new policy and the present value of the premiums yet to be paid on the forfeited policy at the time when the forfeiture occurred. This is approximately the reserve value of the policy.⁷¹

The holding of the federal Supreme Court in the *Statham Case* would seem to be correct. So far as the contract is executory it is thoroughly inequitable, and opposed to right reason, to hold that it is not discharged in accordance with its terms by reason of the nonperformance of the insured, even though performance would be illegal because of the existence of war. But in so far as it is executed and the insured has acquired vested rights in the reserve fund of the insurer, subject to be defeated by nonperformance of a condition subsequent, the relation between insurer and insured is practically

⁷¹ The West Virginia rule is stated somewhat differently, but is similar in effect. It is there held that the insured may recover the difference between what he paid in premiums and the actual cost of sustaining the risk, interest being allowed on each balance from the time of payment. See *Abell v. Insurance Co.*, 18 W. Va. 400.

that of debtor and creditor, and the same rule should be applied as in the case of debts due at the outbreak of war, in which the rights of the creditor are universally held to be merely suspended.⁷²

INSANE PERSONS AS PARTIES INSURED.

44. In accordance with the general law of contracts, insurance contracts made with insane persons are void when such persons have been judicially declared insane; otherwise merely voidable at the option of the insane party, unless such insanity was unknown to the other party, in which case a contract fairly made is enforceable.
45. The intervening insanity of the insured, whereby it becomes impossible for him to perform the conditions of the policy, does not prevent such nonperformance from discharging the insurer in accordance with the terms of the contract, where such conditions are precedent to the continuance of the contract. But where the conditions not performed are subsequent in their nature, and operate to defeat the right to demand payment for a loss already suffered, insanity will excuse nonperformance and avoid a forfeiture.

A contract of insurance made with an insane person is subject to the same rules as to validity as apply to ordinary contracts, which have been stated above, and which are too well settled to require discussion.⁷³ But the peculiar nature of the insurance contract gives rise to an interesting and difficult question as to the effect upon an existing contract of the supervening insanity of the insured, when such affliction renders him incapable of complying with the conditions of the policy.

Intervening Insanity or Mental Incapacity.

While it is scarcely accurate to say that the conditions of a policy are strictly either precedent or subsequent, yet they can be readily distinguished as falling into two classes. First are those whose performance at the time agreed upon is necessary to the continued liability of the insurer to perform in case of loss, such as payment of premiums, and notice of change of interest or of other insurance. Such conditions are so essentially parts of the contract that noncompliance by the insurer amounts to a breach of the agreement, which discharges the insurer from further liability. Thus, while not strictly conditions precedent, they are yet of that nature. It is consequently immaterial what may be the cause of the breach of such conditions

⁷² Lawr. Wheat. 541 et seq.; Sands v. Insurance Co., 50 N. Y. 626, 10 Am. Rep. 535.

⁷³ Clark, Cont. (2d Ed.) 178.

by the insured. The insurer is discharged, even though the insanity or other disability of the insured made performance wholly impossible.⁷⁴ Therefore if the insured fails to pay a premium when due because of insanity or other disabling disease, all his rights under the policy are, nevertheless, forfeited, in accordance with the terms of the contract.⁷⁵

But a second class of conditions are those that stipulate for the doing of some act by the insured after the loss insured against has taken place, such as giving notice and proofs of loss. Such terms are in the nature of conditions subsequent, and the forfeiture of a right that became vested upon the occurrence of the loss by reason of nonperformance of such conditions is in the nature of a penalty. An estate so granted that it can vest only upon the fulfillment of a condition precedent will wholly fail if the condition becomes impossible, but a vested estate is never defeated because of an impossible condition subsequent.⁷⁶ By a reasonable analogy, if, on account of insanity or other disabling disease, it becomes impossible for the insured under all the circumstances to give notice of a loss suffered, or proofs of such loss, or to perform any other such condition subsequent, the right to demand indemnity that became fixed upon the happening of the loss ought not to be defeated.⁷⁷

⁷⁴ Worthington v. Insurance Co., 41 Conn. 372, 19 Am. Rep. 495; Dillard v. Insurance Co., 44 Ga. 119, 9 Am. Rep. 167 (wherein the distinction between conditions precedent and conditions subsequent is stated). See, also, EVANS v. INSURANCE CO., 64 N. Y. 304.

⁷⁵ KLEIN v. INSURANCE CO., 104 U. S. 88, 26 L. Ed. 662; WHEELER v. INSURANCE CO., 82 N. Y. 543, 37 Am. Rep. 594; Carpenter v. Association, 68 Iowa, 453, 27 N. W. 456, 56 Am. Rep. 855; Smith v. Insurance Co., 11 Wkly. Notes Cas. (Pa.) 295; Thompson v. Insurance Co., 104 U. S. 252, 26 L. Ed. 765.

⁷⁶ 2 Washb. Real Prop. § 2 et seq.

⁷⁷ Stout v. Insurance Co., 12 Iowa, 371, 79 Am. Dec. 539; Woodmen Acc. Ass'n v. Byers (Neb.) 87 N. W. 546, 55 L. R. A. 291, 89 Am. St. Rep. 777; Trippe v. Society, 140 N. Y. 23, 35 N. E. 316, 22 L. R. A. 432, 37 Am. St. Rep. 529; Peele v. Society, 147 Ind. 543, 44 N. E. 661; Mandell v. Casualty Co., 170 Mass. 173, 49 N. E. 110, 64 Am. St. Rep. 291; McElroy v. Insurance Co., 88 Md. 137, 41 Atl. 112, 71 Am. St. Rep. 400. See further statements as to the distinction between conditions operating on the contract prior to the loss, and those relating to matters after the loss. McNally v. Insurance Co., 137 N. Y. 398, 33 N. E. 475, cited to this point in Paltrovitch v. Insurance Co., 143 N. Y. 73, 37 N. E. 639, 25 L. R. A. 198; Trippe v. Society, supra; Woodmen Acc. Ass'n v. Byers, supra; McFarland v. Association, 124 Mo. 204, 27 S. W. 436. Cf. NEW YORK LIFE INS. CO. v. STATHAM, 93 U. S. 24, 23 L. Ed. 789.

CHAPTER IV.

INSURABLE INTEREST.

- 46. The General Theory of Insurable Interest.
- 47. Insurable Interest in Property—What Constitutes.
- 48. Duration of Interest.
- 49-52. Insurable Interest in Lives.
- 53. Interest of Creditor in Life of Debtor.
- 54. Interest of the Assignee of a Life Policy.
- 55. Consent of the Life Insured.

THE GENERAL THEORY OF INSURABLE INTEREST.

46. The term *insurable interest* is used to denote that interest appertaining to the insured which is exposed to injury or destruction by reason of the peril insured against. Such interest need not rise to the level of a legal right, and in general it may be said to exist whenever the insurer stands in such a relation to property or a person as to justify a reasonable expectation of financial benefit to be derived from the continued existence of such property or person.

The requirement of an insurable interest to support a contract of insurance is based upon considerations of public policy, which condemn as wagers all agreements for insurance of any subject in which the contracting parties have no such interest. The general theory of what constitutes an insurable interest rests upon the broad principle of indemnity, that lies at the very foundation of insurance law. Thus, in broad terms, one may insure property or life, when he stands in such relation to it that he will be benefited by its continued existence and damnified by its destruction.¹ But what must be the character of the expected benefit, or of the loss that is feared? Must the expected benefit have such a legal basis that its conferring could be compelled by law, or the loss be such as would entitle the insured to damages against a tortfeasor causing it?

An examination of the authorities shows conclusively that in answering this question a sharp distinction must be made between cases of property insurance and those of life insurance.² While it is not necessary that the person insured shall have any title to the property insured, either legal or equitable, yet an expectation of benefit, to be

¹ *CONNECTICUT MUT. LIFE INS. CO. v. SCHAEFER*, 94 U. S. 457, 24 L. Ed. 251.

² See *Crosswell v. Association*, 51 S. C. 103, 28 S. E. 200, 203.

derived from its continued existence, however lively and morally certain of realization it may be, will not afford a sufficient insurable interest unless that expectation has a basis of legal right.³ If such legal basis exists, an expected benefit, however remote, constitutes an insurable interest. This is well illustrated by Lord Eldon in his opinion in the great leading case of *Lucena v. Craufurd*:⁴ "Suppose A. to be possessed of a ship limited to B. in case A. dies without issue; that A. has 20 children, the eldest of whom is 20 years of age; and B. 90 years of age; it is a moral certainty that B. will never come into possession, yet this is a clear interest. On the other hand, suppose the case of the heir at law of a man who has an estate worth £20,000 a year, who is 90 years of age, upon his death-bed, intestate, and incapable from incurable lunacy of making a will; there is no man who will deny that such an heir at law has a moral certainty of succeeding to the estate; yet the law will not allow that he has any interest, or anything more than a mere expectation."

The facts in *Lucena v. Craufurd* well illustrate what is meant by an expectation supported by a legal basis. In that case certain commissioners were appointed under act of Parliament, with power to take possession and dispose of such vessels of the United Provinces as might be brought into English ports. These commissioners insured certain captured Dutch vessels then at St. Helena, which were to be brought into English ports. Before reaching England the insured vessels encountered a storm, and were all lost or seriously damaged. The underwriters sought to escape liability on the ground that the insuring commissioners had no right or interest in the vessels until brought to an English port, and that the insurances were therefore void. But the Court of Exchequer Chamber⁵ held that the commissioners had an insurable interest at the time the policies were taken out; that while they had no present legal right in the vessels themselves, yet they might expect to acquire such right in case the vessels made the voyage in safety. And this expectation was based upon an act of Parliament, which must operate if the vessels came to port. Hence, by the destruction of the vessels at sea, they were prevented from acquiring a legal right in them, and were, therefore, damnified.⁶

³ *Baldwin v. Insurance Co.*, 60 Iowa, 497, 15 N. W. 300. "A man has no right to an indemnity because he has lost the chance to receive a gift." Lord Ellenborough, in *Routh v. Thompson*, 11 East, 428.

⁴ 2 Bos. & P. N. S. 269, at page 324.

⁵ 3 Bos. & P. 99.

⁶ From the judgment of the Exchequer Chamber an appeal was taken to the House of Lords, which, however, did not finally pass upon the question of whether an insurable interest was present, but awarded a *venire de novo* on collateral grounds. 2 Bos. & P. N. R. 269. Lord Eldon, Lord Ellenbor-

So it has been held that a stockholder may insure the property of the corporation, although he has no legal interest whatsoever in such property.⁷ His expectation of benefit to be derived from the continued existence of such property, however, is based upon his legal right as stockholder to demand participation in the profits of the corporation, or in its assets upon dissolution. But the employé of a railway corporation could not insure the engine he drove on the ground that its destruction would prevent the expected continuation of his employment; nor could a surety insure the property of his principal merely because he would look to such property for indemnification in case he should be obliged to pay his principal's debt.⁸ But it would be otherwise if the surety were secured against loss by a mortgage upon the principal's property, or if the creditor held a mortgage upon such property to which the surety, upon payment of the debt, might be subrogated.⁹

Turning to the cases on life insurance we find that no such limitation upon the character of the expectation exists. While the doctrine of insurable interest in lives, like that in property, seems from the authorities to be based on the theory of indemnity for actual loss, yet the expectation of benefit to be derived from the continued existence of a life need have no legal basis whatever.¹⁰ A reasonable probability is sufficient, without more. Thus a brother is under no legal obligation to support his sister, and the mere relationship does not give her an insurable interest in his life. Yet if he has been accustomed to contribute to her support, she may insure his life, on the theory that by his death she will lose expected future contributions, although such contributions would be essentially voluntary.¹¹

Again a marked distinction between the rules affecting insurable interest in property and life, respectively, is seen in the relation re-

ough, and Lord Erskine, however, opposed the decision of the Exchequer Chamber, and the weighty influence of their opinions is apparent in subsequent English cases, which seem to have settled the law contrary to the decision of this celebrated case. See *Routh v. Thompson*, 11 East, 426; *Ebsworth v. Insurance Co.*, L. R. 8 C. P. 596. See, also, opinion of Story, J., in *The Joseph*, 1 Gall. 558, Fed. Cas. No. 7,533; 1 Arnould, Mar. Ins. §§ 304-306.

⁷ *RIGGS v. INSURANCE CO.*, 125 N. Y. 7, 25 N. E. 1058, 10 L. R. A. 684, 21 Am. St. Rep. 716; *WARREN v. INSURANCE CO.*, 31 Iowa, 464, 7 Am. Rep. 160.

⁸ See *Grevemeyer v. Insurance Co.*, 62 Pa. 340, 1 Am. Rep. 420.

⁹ *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743, 67 N. W. 774, 58 Am. St. Rep. 719.

¹⁰ *WARNOCK v. DAVIS*, 104 U. S. 775, 26 L. Ed. 924; *LOOMIS v. INSURANCE CO.*, 6 Gray (Mass.) 399; *Equitable Life Ins. Co. v. Hazelwood*, 75 Tex. 338, 12 S. W. 621, 7 L. R. A. 217, 16 Am. St. Rep. 893; *Carpenter v. Insurance Co.*, 161 Pa. 9, 28 Atl. 943, 23 L. R. A. 571, 41 Am. St. Rep. 880.

¹¹ *LORD v. DALL*, 12 Mass. 115, 7 Am. Dec. 38.

quired between the extent of the interest insured and the amount of the insurance granted thereon. In property insurance the actual value of the interest exposed to loss is the limit of the insurance that can validly be placed thereon. That is to say, the actual pecuniary loss that will be suffered through the destruction of the property insured is the limit of valid insurance on such property. But this rule has no place in life insurance. Granted that an insurable interest exists, there is no limit to the amount of insurance that may be validly contracted for, save such as may be imposed by the discretion of the parties, unless that interest has its origin in commercial relation. The insurable interest possessed by a father in the life of his minor child is said to rest upon the father's right to the child's services.¹² The pecuniary advantage to be derived by the father from the continued existence of the child until majority could not, under the most favorable circumstances, amount to more than a few thousand dollars. Indeed, it is a matter of experience that ordinarily the continued existence of the child is pecuniarily a detriment, on account of the expense of support and education. Yet there is no rule of law that would prevent the father from insuring the life of his child in the sum of one million dollars, or any other large sum which might be agreed upon. A wife has a legal right to support from her husband, and may therefore insure his life.¹³ But in an action upon such a policy, evidence of the husband's incapacity to support his wife, either at the time of the issuance of the policy or at the time of his death, would be wholly irrelevant.*

Still another striking difference is seen to exist, in regard to insurable interest, between property and life insurance. In order that a contract of insurance on property shall be enforceable, an insurable interest must exist in the insured at the time of loss, but not, it seems,¹⁴ at the time of issue. But in life insurance the rule is reversed. A policy of life insurance is wholly invalid unless the assured possesses an insurable interest at the time when the contract is made, while the presence of such an interest at the time of loss is immaterial.¹⁵

These radical differences in regard to the doctrine of insurable interest found to exist between life and property insurance point to

¹² *Mitchell v. Insurance Co.*, 45 Me. 104, 71 Am. Dec. 529.

¹³ *CONNECTICUT MUT. LIFE INS. CO. v. SCHAEFER*, 94 U. S. 457, 24 L. Ed. 251.

* But see *CURRIER v. INSURANCE CO.*, 57 Vt. 496, 52 Am. Rep. 134, in which a contrary rule is suggested.

¹⁴ *Sun Fire Ins. Co. v. Merz*, 64 N. J. Law, 301, 45 Atl. 785, 52 L. R. A. 330; *Davis v. Insurance Co.*, 70 Vt. 217, 39 Atl. 1095.

¹⁵ *CONNECTICUT MUT. LIFE INS. CO. v. SCHAEFER*, 94 U. S. 457, 24 L. Ed. 251; *DALBY v. ASSURANCE CO.*, 15 Q. B. 365.

some fundamental distinction between the principles applicable. It is to be regretted that the courts have not worked out this distinction¹⁶ and based their decisions consistently upon the differing principles obtaining in the determination of what is just between the parties and consonant with the public welfare. Not being guided by any such clearly defined principles, and assuming that the same theory of insurable interest is applicable in both property and life insurance, they have heaped up a body of case law on insurable interest, in regard to life insurance particularly, that is singularly confusing and unsatisfactory, and conducive to uncertainty in the law. It is believed that the true theory upon which this unfortunate conflict of authority could be done away with, and the law on this particular topic reduced to harmony and unity, can be discovered by recognizing the essential difference between property insurance and life insurance, and the consequent difference in the character of the insurable interest required in each.

Property insurance is essentially and entirely a contract of indemnity. Hence an interest for the loss of which the contract provides indemnity is an absolute essential to the valid existence of the contract. Nor is it difficult to determine when such an interest is present, the authorities being well agreed as to what constitutes an insurable interest in property. But life insurance is not essentially or principally a contract of indemnity. While possessing an element of pure insurance based upon indemnity, it is yet principally a contract of investment. It has been more aptly likened to a contract for an annuity, whereby the insured agrees to pay a fixed annuity during his life, in consideration of which the insurer agrees to pay a certain sum upon the death of the insured.¹⁷ But this contract is speculative by reason of the uncertainty of life; and the subject of the contract is human life, which the law has always protected with most jealous care. Therefore the law will not tolerate such contracts made for the mere purpose of speculation, since to do so would be to encourage the perpetration of murder and such other horrid crimes as tend to destroy the very foundations of society. But when made in good faith, for the purpose of accumulating a fund for the support, after the death of the insured, of those dependent upon him, the contract is one that encourages industry and thrift, and tends to relieve society of the burden of caring for its helpless members.

¹⁶ See remarks of Hoar, J., in *Forbes v. Insurance Co.*, 15 Gray (Mass.) 249, 77 Am. Dec. 360.

¹⁷ *DALBY v. ASSURANCE CO.*, *supra*; *Central Bank v. Hume*, 128 U. S. 195, 205, 9 Sup. Ct. 41, 32 L. Ed. 370, per Fuller, C. J.; *NEW YORK LIFE INS. CO. v. STATHAM*, 93 U. S. 24, 23 L. Ed. 789.

The Theoretical Basis of Valid Life Insurance.

The policy of the law, therefore, requires that iniquitous speculation in human life should be prohibited, while bona fide efforts to provide for the support of dependents after death should be encouraged. Thus it is clear that bona fides is the logical test of the propriety, and hence of the validity, of the contract.¹⁸ Accordingly it would seem that whenever the circumstances of the case are such as to afford satisfactory evidence that a policy has been taken out in good faith, and for the legitimate purpose of life insurance, it should be held valid, irrespective of the question of pecuniary loss to be suffered by the beneficiaries by reason of the death of the insured. This theory of insurable interest would justify the statement that a person has a sufficient interest in a life when his relation to that life is such by reason of blood, marriage, or commerce, that he may reasonably be supposed to be desirous of protecting and prolonging it, rather than of destroying it. A more accurate statement of the principle, though one further removed from the language of the adjudged cases, is as follows: A contract of life insurance will be presumed to be made in good faith, and therefore to be valid, when the assured bears such a relation to the insured that it is reasonable to suppose that the assured desires the continued existence of the insured; but this presumption is in every case rebuttable by evidence of actual bad faith.¹⁹

Under this rule those closely related by blood or marriage, as parent and child, brother and sister, and husband and wife, could be consistently allowed to insure each other's lives without reference to the probability of pecuniary benefit to be derived. It would be sufficient that the relation was so intimate that the ties of affection would induce the assured to protect and prolong the life of the insured rather than to endeavor wrongfully to shorten it. On the other hand, more remote relationship, such as that of uncle and nephew, would not be sufficient, without more, to raise a presumption of such

¹⁸ See *Appeal of Corson*, 113 Pa. 438, 6 Atl. 213, 57 Am. Rep. 479; *Crosswell v. Association*, 51 S. C. 103, 28 S. E. 200. It may be objected that the difficulty of determining the existence of good faith in any given case is a serious practical obstacle in the way of the adoption of the suggested rule. Yet the existence of good faith is a necessary element in many well-settled rules of law; for example, the rules determining priority of liens, and the rights of holders of negotiable paper. So, in insurance law, as stated later in the text, the good faith of a creditor in taking out insurance on the life of his debtor in excess of the amount of the debt is the generally accepted test of the validity of such insurance. See *Cammack v. Lewis*, 15 Wall. (U. S.) 643, 21 L. Ed. 244. It is certainly no more difficult to determine whether a contract of insurance has been made in good faith than whether land has been so purchased.

¹⁹ See *Appeal of Corson*, 113 Pa. 438, 6 Atl. 213, 57 Am. Rep. 479.

good faith as would validate the policy taken out by one on the life of another.²⁰ But if it is shown that in any particular case there is some special reason why one should desire the long life of the other, as where the uncle provides for the support and education of the nephew, or is indebted to him,²¹ it might be properly held that the circumstances were sufficient to establish the good faith necessary to validate a contract of life insurance made by one upon the life of another.

No decided case has gone so far as to lay down in terms the rule stated above, but it is submitted that the theory of the best considered decisions, as well as sound reason, would justify its enunciation.²² Indeed, the requirement that the relation between assured and insured shall be such as to show the good faith and lawful purpose of the contract is but a general statement of a principle of which the rule as ordinarily laid down by the courts, viz., that the relation between the parties shall be such as to justify a reasonable expectation of benefit from the continuance of the life insured, is but a phase; for expectation of pecuniary benefit to be received from the insured affords the best evidence that the assured desires the continuance of his life. But such expectation ought not to be the sole evidence of that desire.²³ And that the tendency of the courts is to adopt the broader rule may be seen from statements made by judges of the highest authority, even though such statements are usually obiter dicta. Thus in *Warnock v. Davis*²⁴ the court said: "It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation, for a parent has an insurable interest in the life of his child, and a child in the life of his parent, a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful, as operating more efficaciously, to protect the life of the insured, than any other consideration. But in all cases there must be a reasonable ground, founded upon the relation of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life." In *Loomis v. Eagle Life & Health Ins. Co.*,²⁵ Chief Justice Shaw

²⁰ *SINGLETON v. INSURANCE CO.*, 66 Mo. 63, 27 Am. Rep. 321; Appeal of Corson, *supra*.

²¹ *Union Mut. Life Ins. Co. v. Mowry*, 96 U. S. 544, 24 L. Ed. 674.

²² *Crosswel v. Association*, 51 S. C. 103, 28 S. E. 200; *WARNOCK v. DAVIS*, 104 U. S. 775, 26 L. Ed. 924; *CONNECTICUT MUT. LIFE INS. CO. v. SCHAEFER*, 94 U. S. 457, 24 L. Ed. 251; *ÆTNA LIFE INS. CO. v. FRANCE*, 94 U. S. 561, 24 L. Ed. 287. And see *Equitable Life Ins. Co. v. Hazelwood*, 75 Tex. 338, 12 S. W. 621.

²³ *WARNOCK v. DAVIS*, 104 U. S. 775, 26 L. Ed. 924.

²⁴ *Id.*

²⁵ *LOOMIS v. EAGLE LIFE & HEALTH INS. CO.*, 6 Gray (Mass.) 399.

said: "We cannot doubt that a parent has an interest in the life of a child, and, vice versa, a child in the life of a parent; not merely on the ground of a provision of law that parents and grandparents are bound to support their lineal kindred when they may stand in need of relief, but upon considerations of strong morals, and the force of natural affection between near kindred, operating often more efficaciously than those of positive law." In *Crosswel v. Connecticut Indemnity Ass'n*,²⁶ a soundly decided and well-reasoned case, it is said: "But with respect to life insurance, except when purposely based on some contractual relation as to which death might entail loss of a pecuniary nature, the matter of 'insurable interest' is important only in ascertaining whether the contract is obnoxious to the public policy which condemns gambling on the continuance of human life, because such speculative contracts are supposed to tend to bring about the death of the insured by creating an interest in his death. 'The essential thing (in life insurance) is that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the insured has no interest.' *Connecticut Mut. Life Ins. Co. v. Schaefer*, *supra*."²⁷

"To meet the charge that the contract is a mere wager, it becomes important to show that the person procuring the insurance has an interest also to preserve the life of the insured. This prevents the contract from being a mere wager, although all contracts based on the happening of an uncertain event, or on the uncertain time when a sure event will happen, are in their nature speculative. All agree that a pecuniary interest will save the policy, at least to the extent of the interest; but does a mere pecuniary interest afford the best or strongest guaranty to society that the insured's life will not be destroyed by the holder of the policy? What, then, is to protect society against the danger that, from that standpoint, lurks in a contract of insurance by a creditor on the life of a hopelessly bankrupt debtor? In that case, how does the hopeless prospect of payment by the debtor protect society against the keen interest which the creditor would have in the death of the debtor? Yet we find no case holding such a policy void. So, what pecuniary interest has the wife in the life of a husband incapable of supporting her, or the husband in the life of a wife incapable of rendering service? Yet we find no case holding such a policy void. Indeed, there is much fiction in reference to the supposed necessity of a pecuniary insurable interest to support a life insurance policy, when a near relative insures for the benefit of another. Close ties of blood or affinity, as parent, child,

²⁶ 51 S. C. 103, 28 S. E. 200.

²⁷ *CONNECTICUT MUT. LIFE INS. CO. v. SCHAEFER*, 94 U. S. 457, 24 L. Ed. 251.

brother, sister, husband, wife, with the natural affection and moral forces which generally prompt one such to serve and protect the other, rendering it highly improbable that for money one would take the life of the other, afford a surer guaranty to society against the dangers of betting on the duration of human life than any mere pecuniary interest in the life insured, often more imaginary than real."

Summary.

The results of the above discussion of the general theory of insurable interest may be summarized thus:

(1) The requirement of insurable interest is based on public policy, which prohibits wagers.

(2) The doctrine of insurable interest in property insurance is essentially different from that in life insurance, the two kinds of insurance contracts being themselves essentially different.

(3) Property insurance, being solely for indemnity, is valid only when the insured sustains such a legal relation to the property insured as that its destruction will entail upon him a pecuniary loss or liability.

(4) Life insurance, not being for indemnity, is valid only when contracted for in good faith. As evidence of such good faith the law requires the presence of an insurable interest, which exists when the assured is so related to the insured that he may reasonably be supposed to desire the continuance of the life. It is not necessary that the death of the insured shall cause a pecuniary loss to the assured.

(5) It is necessary, therefore, to discuss separately the doctrines of insurable interest in property and life.

INSURABLE INTEREST IN PROPERTY—WHAT CONSTITUTES.

47. A person has an insurable interest in property when he is so situated with reference to it that by its destruction he will suffer an actual loss of money or legal right, or incur a liability. More specifically, an insurable interest exists in the following cases:

- (a) When the insurer possesses a legal title in the property insured, whether vested or contingent, defeasible or indefeasible.
- (b) When he has an equitable title, of whatever character, and in whatever manner acquired.
- (c) Where he possesses a qualified property in the subject of the insurance.
- (d) Where he has merely possession or right of possession without title or claim of title.
- (e) Where he has neither title nor right in the property, but stands in such relation to it that he has legal ground for expecting benefit from its continued existence, or loss from its destruction.

It is difficult to give a definition of insurable interest in property that is at once broad enough to embrace accurately all of the almost innumerable cases that should properly be included, and precise enough to be of value. Probably the definition laid down in the California Civil Code²⁸ is in as satisfactory a form as can be devised: "Every interest in property, or any relation thereto, or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insurer, is an insurable interest." Of course, as is the case with all definitions, the uncertainty as to the precise meaning of some of the words and phrases used, such as "interest in property," "relation," and "directly damnify," prevents this definition from being of any considerable value in determining difficult cases. The real nature of insurable interest in property is well set forth in the admirable opinion of Lawrence, J., in the leading case of *Lucena v. Craufurd*,²⁹ which not only is characterized by eminent good sense, but also has the sanction both of antiquity and of the enthusiastic approval of subsequent judges and text writers.³⁰ "A man is interested in a thing," says that great judge, "to whom advantage may arise or prejudice happen from the circumstances which may attend it, and whom it importeth that its condition as to safety or other quality should continue. Interest does not necessarily imply a right to a whole or part of the thing, nor necessarily and exclusively that which may be the subject of privation, but the having some relation to, or concern in, the subject of the insurance; which relation or concern, by the happening of the perils insured against, may be so affected as to produce a damage, detriment, or prejudice to the party insuring. And where a man is so circumstanced with respect to matters exposed to certain risks and dangers as to have a moral certainty of advantage or benefit but for those risks and dangers, he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing is to be so circumstanced in respect to it as to have benefit from its existence prejudice from its destruction. The property of a thing, and the interest derivable from it, may be different. Of the first, the price is generally the measure; but by interest in a thing, every benefit and advantage arising out of or depending on such thing may be considered as being comprehended."

Justice Lawrence's statement, however, is too broad. It is necessary that the benefit expected, or detriment that is feared, shall have a legal basis, as is made clear in the opinion of Andrews, J., in *Riggs*

²⁸ See Civ. Code, § 2546.

²⁹ 2 Bos. & P. N. R. 269, at page 302.

³⁰ 1 Arnould, Mar. Ins. (7th Ed.) § 254.

v. Commercial Mut. Ins. Co.,³¹ where the following language is used: "It would seem, therefore, that whenever there is a real interest to protect and a person is so situated with respect to the subject of insurance that its destruction would or might reasonably be expected to impair the value of that interest, an insurance on such interest would not be a wager within the statute, whether the interest was an ownership in, or a right to the possession of, the property, or simply an advantage of a pecuniary character having a legal basis, but dependent upon the continued existence of the subject. It is well settled that a mere hope or expectation, which may be frustrated by the happening of some event, is not an insurable interest."³² It is certain that a mere naked expectation of benefit, uncoupled with any present legal right, will not support a contract of insurance. An expectant heir cannot insure;³³ nor can a general creditor³⁴ insure the property of his debtor, even though destruction of such property would render worthless any judgment he might obtain. In Pennsylvania it has been held that even a judgment creditor, having thereby a general lien on the property, cannot legally insure it until his lien becomes specific.³⁵ But this is contrary to the weight of authority.³⁶ In case the debtor is dead, and without suffi-

³¹ RIGGS v. COMMERCIAL MUT. INS. CO., 125 N. Y. 7, 25 N. E. 1058, 10 L. R. A. 684, 21 Am. St. Rep. 716.

³² "An interest, to be insurable, does not depend necessarily upon the ownership of the property. It may be a special or limited interest, disconnected from any title, lien, or possession. If the holder of an interest in property will suffer loss by its destruction, he may indemnify himself therefrom by a contract of insurance. If, by the loss, the holder of the interest is deprived of the possession, enjoyment, or profit of the property, or a security or lien arising thereon, or other certain benefits growing out of or depending upon it, he has an insurable interest." Post, J., in German Ins. Co. v. Hyman, 34 Neb. 704, 52 N. W. 401.

³³ Baldwin v. Insurance Co., 60 Iowa, 497, 15 N. W. 300. And see the dictum of Lord Eldon in Lucena v. Craufurd, 2 Bos. & P. N. R. 269, at page 324. It has been held that an heir expectant, in possession of property, had an insurable interest therein, but the decision is of doubtful authority. Home Ins. Co. v. Mendenhall, 164 Ill. 458, 45 N. E. 1078, 36 L. R. A. 374. It seems that the heirs of a decedent have an insurable interest in the property of the estate. Herkimer v. Rice, 27 N. Y. 163.

³⁴ Foster v. Van Reed, 5 Hun (N. Y.) 321; Phillips, Ins. § 201; 1 Arnould, Mar. Ins. (7th Ed.) § 310.

³⁵ Grevemeyer v. Insurance Co., 62 Pa. 340, 1 Am. Rep. 420; Light v. Insurance Co., 169 Pa. 310, 32 Atl. 439, 47 Am. St. Rep. 904.

³⁶ Spare v. Insurance Co., 15 Fed. 707. And see ROHRBACH v. INSURANCE CO., 62 N. Y. 47, 20 Am. Rep. 451. In the first case it was also held that the creditor could not recover without showing that the judgment debtor had not sufficient property left out of which the judgment could be satisfied. The statute required the creditor to proceed against the debtor's personalty first. But it was clearly incorrect to base the insured's right of recovery upon the insufficiency of the remaining realty of the debtor to sat-

cient personalty to pay his debts, it is held that a general creditor may insure his real estate, on the ground that the right of such creditor to subject the realty to the payment of his debt is in the nature of a proceeding in rem, since all personal liability ceased with the death of the debtor,³⁷ and no personal judgment may be had against his personal representative.

The nature of insurable interest, which has been seen to be so difficult of precise definition or adequate description, can best be shown by setting forth some of the numerous relations to property which have been held by the courts to afford interest sufficient to validate insurance on such property; and these will best serve our purpose as illustrations if roughly classified.

Where the Insured Has Legal Title.

Any legal title in property, of whatever character, constitutes an insurable interest therein. The interest may be contingent and remote, but is yet insurable. Thus a contingent remainderman³⁸ may protect his interest, but the expectant heir cannot. He has merely an expectation, but no estate or interest. Likewise, dower inchoate, not being an estate in land, cannot be insured.³⁹ But curtesy initiate⁴⁰ affords sufficient interest, as do curtesy and dower consummate, and any other life estate.⁴¹ So any chattel real is insurable, however brief the term,⁴² and not only the lessee, but the sublessee,⁴³

isfy the debt. He insured, not his debt, but his interest in the property, and his ability to satisfy his claim by the sale of other realty of the debtor should not have released the insurer. See notes 56, 57, *infra*.

³⁷ CREED v. FIRE OFFICE, 101 Ala. 522, 14 South. 323, 23 L. R. A. 177, 46 Am. St. Rep. 134; ROHRBACH v. INSURANCE CO., 62 N. Y. 47, 20 Am. Rep. 451; Sheppard v. Insurance Co., 21 W. Va. 368.

³⁸ See the dictum of Lord Eldon in Lucena v. Craufurd, *supra*.

³⁹ See the argument of Berkshire, J., in Traders' Ins. Co. v. Newman, 120 Ind. 554, 22 N. E. 428; and see Flynn v. Flynn, 171 Mass. 312, 50 N. E. 650, 42 L. R. A. 98, 68 Am. St. Rep. 427.

⁴⁰ Franklin Marine & Fire Ins. Co. v. Drake, 2 B. Mon. (Ky.) 47; KYTE v. ASSURANCE CO., 144 Mass. 43, 10 N. E. 518. A husband, being entitled to curtesy in the equitable estates of his wife, has, after the birth of issue, an insurable interest in such property. Harris v. Insurance Co., 50 Pa. 341.

⁴¹ Hartford Fire Ins. Co. v. Haas, 87 Ky. 531, 9 S. W. 720, 2 L. R. A. 64; Home Ins. Co. v. Field, 42 Ill. App. 392; Redfield v. Insurance Co., 56 N. Y. 354, 15 Am. Rep. 424. See, also, Curry v. Insurance Co., 10 Pick. (Mass.) 535, 20 Am. Dec. 547.

⁴² Philadelphia Tool Co. v. British-American Assur. Co., 132 Pa. 236, 19 Atl. 77, 19 Am. St. Rep. 596; Home Ins. Co. of New York v. Gibson, 72 Miss. 58, 17 South. 13; Mitchell v. Insurance Co., 32 Iowa, 422. If the lessee has erected buildings upon the leased land, and has the right to remove them, he has an insurable interest in them to their full value, although they would be worth only one-fourth as much if removed. LAURENT v. INSURANCE

⁴³ Fowle v. Insurance Co., 122 Mass. 191, 23 Am. Rep. 308; May, *Ins.* § 84.

may insure. The lessor also might insure the same property.⁴⁴ The title of the insured may be defeasible upon condition subsequent,⁴⁵ or voidable, or even void, if claimed in good faith.⁴⁶ And in the absence of a misrepresentation as to title or ownership, the insurer may not question such bona fide claim of title.⁴⁷ So it was held that a grantor, after the delivery of a deed in escrow, had an insurable interest in the property conveyed until the conditions were performed.⁴⁸

Even when the owner has parted with the beneficial title, and retains only a legal title as trustee, he may insure; as in the case of the seller of property not yet conveyed,⁴⁹ or of a mortgagor.⁵⁰ So

CO., 1 Hall (N. Y.) 45. So, where the lessee has agreed to redeliver the property in good condition, this liability gives him an insurable interest in it to its full value. *Imperial Fire Ins. Co. v. Murray*, 73 Pa. 13. A tenant at will, being entitled under statute to 30 days' notice before he can be dispossessed, has an insurable interest in the premises. *Schaeffer v. Insurance Co.*, 113 Iowa, 652, 85 N. W. 985. A tenant at sufferance has no insurable interest in the property so held. *Birmingham v. Insurance Co.*, 42 Barb. (N. Y.) 457.

⁴⁴ *Lycoming Fire Ins. Co. v. Haven*, 95 U. S. 242, 24 L. Ed. 473; *Columbia Ins. Co. v. Cooper*, 50 Pa. 331.

⁴⁵ *McCutcheon v. Ingraham*, 32 W. Va. 378, 9 S. E. 260; *Biddeford Sav. Bank v. Dwelling-House Ins. Co.*, 81 Me. 566, 18 Atl. 298.

⁴⁶ The insured, being in possession of property under a reasonable and honest belief that he is the owner, is not deprived of his insurable interest by the fact that his title is in dispute. *Monroe County Mut. Ins. Co. v. Robinson*, 5 Wkly. Notes Cas. 389. Possession under an unauthorized conveyance from an executor constitutes an insurable interest. *Home Ins. Co. v. Gilman*, 112 Ind. 7, 13 N. E. 118. It is immaterial, as between the insured and the insurer, that the former bought the insured property at a judicial sale fraudulently brought about by him. *Frierson v. Brenham*, 5 La. Ann. 540, 52 Am. Dec. 603. It is of no consequence to the insurer that the insured's deed is improperly acknowledged. *Sanford v. Insurance Co.*, 174 Mass. 416, 54 N. E. 883, 75 Am. St. Rep. 358. The grantee in a fraudulent conveyance has an insurable interest in the property conveyed. *Phoenix Ins. Co. v. Mitchell*, 67 Ill. 43; *Home Ins. Co. v. Allen*, 93 Ky. 270, 19 S. W. 743. Possession under claim of ownership is prima facie evidence of title and of an insurable interest. *Franklin Fire Ins. Co. v. Chicago Ice Co.*, 36 Md. 102, 11 Am. Rep. 469; *Kansas Ins. Co. v. Berry*, 8 Kan. 159. See, further, *Helvetia Swiss Fire Ins. Co. v. Allis Co.*, 11 Colo. App. 264, 53 Pac. 242; *City of New York v. Brooklyn Fire Ins. Co.*, 41 Barb. (N. Y.) 231; *David v. Insurance Co.*, 83 N. Y. 265, 38 Am. Rep. 418.

⁴⁷ *Home Ins. Co. v. Gilman*, 112 Ind. 7, 13 N. E. 118.

⁴⁸ *Merchants' Ins. Co. v. Nowlin* (Tex. Civ. App.) 56 S. W. 198.

⁴⁹ *Boston & S. Ice Co. v. Royal Ins. Co.*, 12 Allen (Mass.) 381, 90 Am. Dec. 151; *Hill v. Insurance Co.*, 59 Pa. 474; *Wheeling Ins. Co. v. Morrison*, 11 Leigh (Va.) 354, 36 Am. Dec. 385. A conditional contract of sale does not divest the vendor of his insurable interest. *Wood v. Insurance Co.*, 46 N. Y. 421. A vendor of goods, who holds them to secure the payment of the

⁵⁰ See note 50 on following page.

an assignee for the benefit of creditors may insure the assigned property,⁵¹ or an executor the property devised to him for trust purposes designated in the will.⁵² Even a naked trustee may procure in his own name insurance on the trust property.⁵³ Of course, however, he would take the proceeds of such insurance impressed with the conditions of the original trust.

The mere fact that the owner of property may possess other means of protecting himself against the loss covered by the insurance does not deprive him of his insurable interest in such property. Thus a manufacturer of tobacco has an insurable interest in uncanceled revenue stamps, although by statute he is entitled to be reimbursed for such stamps as may have been destroyed or become useless.⁵⁴ So the owner of land upon which buildings are in course of construction has an insurable interest in them even though he is under no obligation to pay the contractor, who has furnished all material and labor used, until the completion of the structures.⁵⁵ Neither will the right of the insurer to resort to the contract liability of a third person in order to make good his loss in any wise affect his insurable interest; as where the vendor may enforce full payment of purchase

purchase money, retains an insurable interest. *Norcross v. Ins. Cos.*, 17 Pa. 429, 55 Am. Dec. 571. See, further, *Clinton v. Insurance Co.*, 45 N. Y. 454; *Ætna Ins. Co. v. Jackson*, 16 B. Mon. (Ky.) 242.

⁵⁰ *Carpenter v. Insurance Co.*, 16 Pet. (U. S.) 495, 10 L. Ed. 1044; *McDonald v. Black's Adm'r*, 20 Ohio, 185, 55 Am. Dec. 448; *Lycoming Fire Ins. Co. v. Jackson*, 83 Ill. 302, 25 Am. Rep. 386; *Guest v. Insurance Co.*, 66 Mich. 93, 33 N. W. 31; *Jackson v. Insurance Co.*, 23 Pick. (Mass.) 418, 34 Am. Dec. 69; *Washington Fire Ins. Co. v. Kelly*, 32 Md. 421, 3 Am. Rep. 149. Mortgagors and pledgors of chattels have an insurable interest in them. *Manson v. Insurance Co.*, 64 Wis. 26, 24 N. W. 407, 54 Am. Rep. 573; *Nussbaum v. Insurance Co.* (C. C.) 37 Fed. 524, 1 L. R. A. 704; *Kronk v. Insurance Co.*, 91 Pa. 300; *Jones, Chat. Mortg.* § 100. The mortgagor has an insurable interest equal to the value of the mortgaged property: *Carpenter v. Insurance Co.*, supra; *Jones, Mortg.* § 397. "The owner of an equity of redemption has an insurable interest equal to the value of the insurable property embraced therein, whether he is personally liable for the mortgage debt or not." Mr. Justice Bradley, in *ROYAL INS. CO. v. STINSON*, 103 U. S. 25, 26 L. Ed. 473.

⁵¹ Even though he has not filed his bond (*Sibley v. Insurance Co.*, 57 Mich. 14, 23 N. W. 473), and though the deed of assignment has not been approved by the creditors (*Phoenix Ins. Co. v. Adams' Trustee*, 8 Ky. Law Rep. 532).

⁵² *Savage v. Insurance Co.*, 52 N. Y. 502, 11 Am. Rep. 741.

⁵³ *Howard Fire Ins. Co. v. Chase*, 5 Wall. (U. S.) 509, 18 L. Ed. 524; *Young v. Insurance Co.* (D. C.) 24 Fed. 279; *Dick v. Insurance Co.*, 81 Mo. 103.

⁵⁴ *United States v. American Tobacco Co.*, 166 U. S. 468, 17 Sup. Ct. 619, 41 L. Ed. 1081.

⁵⁵ *FOLEY v. INSURANCE CO.*, 152 N. Y. 131, 46 N. E. 318, 43 L. R. A. 664; *Santa Clara Female Academy v. Northwestern Nat. Ins. Co.*, 98 Wis. 257, 73 N. W. 767, 67 Am. St. Rep. 805.

price under an executory contract of sale, despite destruction of buildings before conveyance,⁵⁶ or where an insured mortgagee's security is ample despite the loss of the insured property.⁵⁷

When Insured Has an Equitable Title.

It is well settled that possession of an equitable title, however obtained, gives an insurable interest in the property in which such title inheres.⁵⁸ Thus a vendee before conveyance,⁵⁹ a mortgagee,⁶⁰ a mortgagor after foreclosure and before the expiration of the period within

⁵⁶ RAYNER v. PRESTON, 18 Ch. Div. 1. See, also, FOLEY v. INSURANCE CO., supra.

⁵⁷ Stetson v. Insurance Co., 4 Mass. 330, 3 Am. Dec. 217. And see Wheeling Ins. Co. v. Morrison, 11 Leigh (Va.) 367, 36 Am. Dec. 335; EXCELSIOR FIRE INS. CO. v. ROYAL INS. CO., 55 N. Y. 343, 14 Am. Rep. 271.

⁵⁸ Gilman v. Insurance Co., 81 Me. 488, 17 Atl. 544; STRONG v. INSURANCE CO., 10 Pick. (Mass.) 40, 20 Am. Dec. 507; Redfield v. Insurance Co., 56 N. Y. 354, 15 Am. Rep. 424.

⁵⁹ FRANKLIN FIRE INS. CO. v. MARTIN, 40 N. J. Law, 568, 29 Am. Rep. 271; Hough v. Insurance Co., 29 Conn. 10, 76 Am. Dec. 581; AETNA FIRE INS. CO. v. TYLER, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90; Carpenter v. Insurance Co., 135 N. Y. 298, 31 N. E. 1015; IMPERIAL FIRE INS. CO. v. DUNHAM, 117 Pa. 460, 12 Atl. 668, 2 Am. St. Rep. 686. Even though the agreement is by parol and unenforceable under the statute of frauds, yet, if it is saved in equity by the doctrine of part performance, it constitutes an insurable interest. Redfield v. Insurance Co., 56 N. Y. 354, 15 Am. Rep. 424.

⁶⁰ KING v. INSURANCE CO., 7 Cush. (Mass.) 54 Am. Dec. 683; Foster v. Van Reed, 70 N. Y. 19, 26 Am. Rep. 544. Successive mortgagees may each insure. Fox v. Insurance Co., 52 Me. 333. The insurance by a mortgagee is not an insurance of the mortgage debt, as was said by Mr. Justice Story in Carpenter v. Insurance Co., 16 Pet. (U. S.) 495, 501, 10 L. Ed. 1044; nor is it an insurance of the capacity of the insured property to pay the debt, which was the view taken by Gibson, J., in Smith v. Insurance Co., 17 Pa. 253, 55 Am. Dec. 546. Against these dicta is the decision of Folger, J., in EXCELSIOR FIRE INS. CO. v. ROYAL INS. CO., 55 N. Y. 343, 14 Am. Rep. 271. After reviewing the cases, Mr. Justice Folger says: "To say that it is the debt which is insured against loss is to give to most, if not all, fire insurance companies a power to do a kind of business which the law and their charter do not confer. They are privileged to insure property against loss or damage by fire. They are not privileged to guaranty the collection of debts. If they are, they may insure against the solvency of the debtor. No one will contend this, and it will be said it is not by a guaranty of the debt, but an indemnity is given against the loss of the debt by an insurance against the perils to the property by fire. This is but coming to our position: that it is the property which is insured against the loss by fire, and the protection to the debt is the sequence thereof. As the property it is which is insured against loss, it is the loss which occurs to it which the insurer contracts to pay, and for such loss he is to pay within the limit of his liability, irrespective of the value of the property undestroyed." See, also, Jones, *Mortg.* § 419.

which redemption is allowed,⁶¹ the beneficiary under a deed of trust,⁶² the creditors under a deed of assignment,⁶³ and even the vendee of goods when title is to remain in the vendor until delivery,⁶⁴ have all an interest that may be validly protected by insurance. So in *Columbian Ins. Co. v. Lawrence*⁶⁵ it was held, in an opinion by Chief Justice Marshall, that an interest taken under a voidable executory contract of sale was insurable. One in possession of land with bond for title unquestionably has an insurable interest in the buildings on the land.⁶⁶

When the Insured Possesses a Qualified Property.

A person having a qualified property in chattels, entitling him to possession and the right of using or dealing with them in accordance with the terms of the bailment, has such an interest in the chattels as may be the subject of a valid contract of insurance. Such bailee may insure merely his interest in the chattel, to protect himself against loss of the benefits to which he is entitled,⁶⁷ or he may, and does more frequently, insure himself against the liability which he may incur upon the destruction of the chattels.⁶⁸ In case of loss, the bailee, who has insured in his own name, may recover the full value of the property,

⁶¹ *Mechler v. Insurance Co.*, 38 Wis. 665; *STRONG v. INSURANCE CO.*, 10 Pick. (Mass.) 40, 20 Am. Dec. 507. But after the time allowed for redemption has elapsed, the mortgagor's interest ceases, notwithstanding a promise, without consideration, to extend such time. *Essex Sav. Bank v. Meriden Fire Ins. Co.*, 57 Conn. 335, 17 Atl. 930, 4 L. R. A. 759.

⁶² *HILL v. SECRETAN*, 1 Bos. & P. 315; *Gordon v. Insurance Co.*, 2 Pick. (Mass.) 249; *Harvey v. Cherry*, 76 N. Y. 436; *Tilley v. Insurance Co.*, 86 Va. 811, 11 S. E. 120.

⁶³ See *Columbian Ins. Co. v. Lawrence*, 2 Pet. (U. S.) 25, 7 L. Ed. 335.

⁶⁴ *Bohn Mfg. Co. v. Sawyer*, 169 Mass. 477, 48 N. E. 620.

⁶⁵ 2 Pet. (U. S.) 25, 7 L. Ed. 335. See, also, *Gilman v. Insurance Co.*, 81 Me. 488, 17 Atl. 544.

⁶⁶ *Clapp v. Insurance Ass'n*, 126 N. C. 388, 35 S. E. 617. So an assignee of a title bond has an insurable interest in the property. *Ayres v. Insurance Co.*, 17 Iowa, 176, 85 Am. Dec. 553.

⁶⁷ "A distinction is to be kept in mind between the agent's insurable interest and his authority to insure for his consignor or other principal." 1 Phill. Ins. § 309. A commission merchant to whom goods are consigned has an insurable interest in them to the extent of the commissions he would receive on the sales. *PUTNAM v. INSURANCE CO.*, 5 Metc. (Mass.) 386. So, where a general agent has a lien on a cargo for advancements, this gives him an insurable interest therein. *Wolff v. Horncastle*, 1 Bos. & P. 316. See, also, *Russel v. Insurance Co.*, 1 Wash. C. C. 409, Fed. Cas. No. 12,146.

⁶⁸ *Crowley v. Cohen*, 3 Barn. & Adol. 478. A common carrier which has insured goods for which it is liable may recover on the policy, notwithstanding other carriers are bound by contract to indemnify it. *Commonwealth v. Hide & Leather Ins. Co.*, 112 Mass. 136, 17 Am. Rep. 72. See, also, *PHOENIX INS. CO. v. ERIE & W. TRANSP. CO.*, 117 U. S. 312, 6 Sup. Ct. 750, 29 L. Ed. 873; *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. C. 213, 15 S. E. 562; *SHAW v. INSURANCE CO.*, 49 Mo. 578, 8 Am. Rep. 150.

holding the excess above his interest in trust for the owners.⁶⁹ Thus where the plaintiffs had taken in their own names insurance on certain specified articles constituting the stock of their pork-packing house, the larger part of which stock belonged to other persons as bailors, it was held that the plaintiffs might recover the whole amount of loss, in their own right for their property destroyed, and as trustees of that belonging to others, whether the policies read "for the benefit of whom it may concern" or not.⁷⁰ So in *California Ins. Co. v. Union Compress Co.*,⁷¹ a cotton compress company had procured insurance upon cotton situated in specified places, and held by it "in trust or on commission." The receipts of the compress company to depositors stipulated that it should not be responsible for loss by fire. These receipts were exchanged for railway bills of lading, which also exempted the railway companies from liability for loss by fire. Cotton embraced under the terms of the policy was burned through the negligence of the railway companies. Under these facts the Supreme Court of the United States held that it was competent for the insured compress company to show that the insurance was taken out for the benefit of the railway companies, and that "it was lawful for the plaintiff to insure in its own name goods held in trust by it, and it can recover for their entire value, holding the excess over its own interest in them for the benefit of those who have intrusted the goods to it," in this case the railway companies.⁷²

It was also held that the railway companies would be liable to the owners of the cotton for the loss due to their negligence, despite the stipulations for exemption in the bills of lading, and therefore had such an insurable interest in the cotton as would enable them to claim the benefit of the insurance taken out in their behalf; and, further, the court reaffirmed the doctrine laid down in *Phoenix Ins. Co. v. Erie & W. Transp. Co.*,⁷³ that "no rule of law or public policy is violated by allowing a common carrier, like any other person having either the

⁶⁹ *WATERS v. ASSURANCE CO.*, 5 EL. & BL. 870; *Waring v. Insurance Co.*, 45 N. Y. 606, 6 Am. Rep. 146; *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527, 23 L. Ed. 868; *Murdock v. Insurance Co.*, 33 W. Va. 407, 10 S. E. 777, 7 L. R. A. 572. Where insurance is effected by a bailee or agent upon his own authority, he may abandon or cancel it before his principal has in any manner ratified it. *Stillwell v. Staples*, 19 N. Y. 401.

⁷⁰ *Aetna Ins. Co. v. Jackson*, 16 B. Mon. (Ky.) 242.

⁷¹ 133 U. S. 387, 10 Sup. Ct. 385, 33 L. Ed. 730. See, also, *Roberts v. Insurance Co.*, 165 Pa. 55, 30 Atl. 450, 44 Am. St. Rep. 642.

⁷² See, also, *Roberts v. Insurance Co.*, 165 Pa. 55, 30 Atl. 450, 44 Am. St. Rep. 642.

⁷³ *PHOENIX INS. CO. v. ERIE & W. TRANSP. CO.*, 117 U. S. 312, 6 Sup. Ct. 750, 29 L. Ed. 873. Approved also in *Orient Ins. Co. v. Adams*, 123 U. S. 67, 8 Sup. Ct. 68, 31 L. Ed. 63; *Liverpool & G. W. Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 438, 9 Sup. Ct. 469, 32 L. Ed. 788.

general property or a peculiar interest in the goods, to have them insured against the usual perils, and to recover for any loss from such perils, though occasioned by the negligence of his own servants."

The same rules as to possession of insurable interest and the measure of recovery in case of loss applies to all other classes of bailees, such as innkeepers, warehousemen,⁷⁴ commission merchants or factors,⁷⁵ and hirers of chattels,⁷⁶ as well as to receivers.⁷⁷ In case a receiver improperly applies funds in his hands to the payment of premiums on insurances effected on property intrusted to him, the insurer may not set up such fact in defense as making the insurance void. Such transgression by the receiver is a matter between him and the appointing court with which the insurer has no concern.⁷⁸

Insurable Interest in Liens.

Any person having a specific lien upon property has an insurable interest in such property to the extent of his lien.⁷⁹ Thus an agent may insure goods of his principal to protect his lien for commissions,⁸⁰ or the carrier the goods of the shipper to protect his lien for freight.⁸¹ So the judgment creditor may insure goods seized under execution,⁸²

⁷⁴ *WATERS v. ASSURANCE CO.*, 5 EL. & BL. 870; *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527, 23 L. Ed. 868; *Fire Ins. Ass'n v. Merchants' & Miners' Transp. Co.*, 66 Md. 339, 7 Atl. 905, 59 Am. Rep. 162. The language used in describing the property covered is important. Thus in *Lockhart v. Cooper*, 87 N. C. 149, 42 Am. Rep. 514, the phrases used were "owned," or "held in trust or on commission," or "sold and not delivered," and it was held that the policy did not cover goods which had been sold, and of which a technical delivery had been made, though not removed from the warehouse. But in *Waring v. Insurance Co.*, 45 N. Y. 606, 6 Am. Rep. 146, the phrase "sold but not removed" was employed, and it was held that the policy covered goods sold, and to which the legal title had passed, but which had been left in the warehouse.

⁷⁵ *Phoenix Ins. Co. v. Hamilton*, 14 Wall. (U. S.) 504, 20 L. Ed. 729; *De Forest v. Insurance Co.*, 1 Hall (N. Y.) 84; *Siter v. Morris*, 13 Pa. 218.

⁷⁶ Where the hirer covenants to pay the value in case of loss, this liability gives him an insurable interest. *Oliver v. Greene*, 3 Mass. 133, 3 Am. Dec. 96. So a charterer who has agreed to insure may insure the vessel. *Bartlet v. Walter*, 13 Mass. 267, 7 Am. Dec. 143. And the charterer may insure for the owners. *Murdock v. Insurance Co.*, 33 W. Va. 407, 10 S. E. 777, 7 L. R. A. 572.

⁷⁷ *Thompson v. Insurance Co.*, 136 U. S. 287, 10 Sup. Ct. 1019, 34 L. Ed. 408; *In re Hamilton (D. C.)* 102 Fed. 683.

⁷⁸ *Thompson v. Insurance Co.*, supra.

⁷⁹ *Sun Mut. Ins. Co. v. Tufts*, 20 Tex. Civ. App. 147, 50 S. W. 180. The holder of a lien on a homestead, voidable under the statute, has an insurable interest. *Parks v. Insurance Co.*, 100 Mo. 373, 12 S. W. 1053.

⁸⁰ See *SHAW v. INSURANCE CO.*, 49 Mo. 578, 8 Am. Rep. 150.

⁸¹ See *Hough v. Insurance Co.*, 36 Md. 398; *Savage v. Insurance Co.*, 36 N. Y. 655.

⁸² *Hancox v. Insurance Co.*, 3 Sumn. 132, Fed. Cas. No. 6,013. And see

and the mechanic or material man the building upon which he holds a statutory lien.⁸³ It has even been held that a mechanic, who has an inchoate lien which binds a mere equity of redemption in the buildings erected, may insure such buildings.⁸⁴ So the holder of a mere equitable lien on a vessel may insure her.⁸⁵ In like manner one who sailed a vessel for commissions to be received, with authority to hold her as security for his claims, was held to have an insurable interest in her.⁸⁶ In *Mutual Fire Ins. Co. v. Ward*⁸⁷ a landlord procured insurance upon the furniture of his tenant while situated on the leased premises. It was held that the right to levy distress upon the furniture for the rent that was due and unpaid constituted a sufficient insurable interest.

Mere Right of Possession in Insured.

A person having the mere right of possession of property may insure it to its full value and in his own name, even when he is not responsible for its safe-keeping.⁸⁸ Thus a bailee may recover under a policy insuring goods gratuitously kept in store for another. Of course, the proceeds of such insurance are held in trust for the owner of the goods; and the recovery is on the ground that the policy is procured on behalf of an undisclosed principal, especially when it is taken out "for the benefit of whom it may concern."⁸⁹ So a sheriff having in his custody goods seized under execution may validly secure insurance upon them.⁹⁰

When Insured Has no Title or Interest in the Property.

As has been stated heretofore, a person may possess no title or legal interest in property, and yet be so circumstanced with respect to it that he will be directly damaged by its destruction. But the damnification must have a legal basis; the loss must be of a legal right. The shattering of expectations, however bright, or the disappointing of hopes however strong, does not constitute such a loss as may be indemnified by insurance. Thus a general creditor, as has been before

Donnell v. Donnell, 86 Me. 518, 30 Atl. 67; *International Trust Co. v. Boardman*, 149 Mass. 158, 21 N. E. 239.

⁸³ *Stout v. Insurance Co.*, 12 Iowa, 371, 79 Am. Dec. 539; *Protection Ins. Co. v. Hall*, 15 B. Mon. (Ky.) 411. See *Harvey v. Cherry*, 76 N. Y. 436.

⁸⁴ *ROYAL INS. CO. v. STINSON*, 103 U. S. 25, 26 L. Ed. 473.

⁸⁵ *Bowring v. Insurance Co. (D. C.)* 46 Fed. 119.

⁸⁶ *The Gulnare (C. C.)* 42 Fed. 861.

⁸⁷ 95 Va. 231, 28 S. E. 209. See, also, *Columbia Ins. Co. v. Cooper*, 50 Pa. 331.

⁸⁸ *Fire Ins. Ass'n v. Merchants' & Miners' Transp. Co.*, 66 Md. 339, 7 Atl. 905, 59 Am. Rep. 162; *PHOENIX INS. CO. v. ERIE & W. TRANSP. CO.*, 117 U. S. 312, 6 Sup. Ct. 750, 29 L. Ed. 873.

⁸⁹ *Hooper v. Robinson*, 98 U. S. 528, 25 L. Ed. 219; *Snow v. Carr*, 61 Ala. 363, 32 Am. Rep. 3.

⁹⁰ *White v. Madison*, 26 N. Y. 117; *Smith v. Huddleston*, 103 Ala. 223, 15 South. 521.

shown, cannot insure the property of his debtor by means of which he hopes to receive payment of his claim. Nor could one named as devisee in a will insure the property designated before the testator's death, however reasonable his expectation of benefit to be derived from the continued existence of the property. His expectation has no legal basis, since a will has no legal effect before the death of the testator. But when the expectation of benefit or advantage is founded upon a legal right, an insurable interest exists, even though the probability of injury to the insurer by the happening of the peril insured against is very remote. Thus stockholders of a corporation have an insurable interest in the property of the corporation;⁹¹ for though they have no title whatever to such property, they have a right to share in the profits of the corporation, and this right, in a proper case, will be protected by a court of equity. Likewise it has been held that where a mortgagor had sold the mortgaged premises to a vendee who assumed the payment of the mortgage debt, and had thus parted with all his interest in the property, the mortgagor yet had an insurable interest in the property because of his personal liability for the debt and his right to be subrogated to the mortgage security in case he should be compelled to make payment.⁹² Likewise where certain mortgagees, after they had indorsed notes and assigned the mortgage that secured them, procured insurance on the mortgaged property, payable to the assignee, it was held that the mortgagees had an interest, since in case they were held on their indorsement they would be entitled to a reassignment of the mortgage.⁹³

It is generally held that the husband has no insurable interest in the separate property of his wife when the statutes deny him the right of possession, or the enjoyment of rents and profits, even though he may be in actual possession.⁹⁴ This is equally true where the wife is not

⁹¹ *WARREN v. INSURANCE CO.*, 31 Iowa, 464, 7 Am. Rep. 160; *RIGGS v. INSURANCE CO.*, 125 N. Y. 7, 25 N. E. 1058, 10 L. R. A. 684, 21 Am. St. Rep. 716; *Seamen v. Insurance Co. (C. C.)* 18 Fed. 250. And see *Wilson v. Jones*, 2 Exch. 139; *Glover v. Wells*, 40 Ill. App. 350. There is a dictum to the contrary in *Phillips v. Insurance Co.*, 20 Ohio, 174.

⁹² *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743, 67 N. W. 774, 58 Am. St. Rep. 719; *Waring v. Loder*, 53 N. Y. 581.

⁹³ *WILLIAMS v. INSURANCE CO.*, 107 Mass. 377, 9 Am. Rep. 41.

⁹⁴ *AGRICULTURAL INS. CO. v. MONTAGUE*, 38 Mich. 548, 31 Am. Rep. 326; *Clark v. Insurance Co.*, 81 Me. 373, 17 Atl. 303; *Trott v. Insurance Co.*, 83 Me. 362, 22 Atl. 245; *Traders' Ins. Co. v. Newman*, 120 Ind. 554, 22 N. E. 428. But a husband in the possession and enjoyment of the realty of his wife, with an inchoate right of curtesy, has an insurable interest therein. *TRADE INS. CO. v. BARRACLIFF*, 45 N. J. Law, 543, 46 Am. Rep. 792. In the case last cited it was also held that a husband had an insurable interest in his wife's personality which he had in his possession, and the benefits of which he enjoyed. But such a holding seems opposed to sound principle, and a contrary doctrine was laid down in *AGRICULTURAL INS. CO. v.*

allowed to sell or incumber her property except with the consent of her husband and his uniting with her in the conveyance, and when he, under the law, might inherit her property.⁹⁵ But an insurable interest exists where the wife holds such separate estate under a parol trust in favor of the husband. Thus in *Horsch v. Dwelling House Ins. Co.*,⁹⁶ a man had bought with his own money land that was conveyed to his wife, with the parol understanding that he was to have possession and the beneficial use of the property for the purpose of supporting the family, and that the wife was to make conveyance to him upon his request. The husband erected buildings on the land, and insured them in his own behalf. The insurer sought to escape liability under the policy by pleading that the husband had no insurable interest, but the court gave judgment for the plaintiff on the ground that "the possession and use of the house and barns was of the utmost importance to him in providing a support for himself and family, and their destruction was substantially as disastrous to him in his endeavor to support himself and family as though he had the actual title." But a mere intruder, who has no color of title to the land upon which he erects buildings, cannot insure such buildings, even though the actual expense incurred in erecting them far exceeds the amount of the insurance.⁹⁷ So where a turnpike company voluntarily contributed to the cost of erecting a bridge, in which it had no property interest, but which was used by travelers over the company's road, thus adding to the profits of the company, it was held that the company was without an insurable interest in the bridge. It is true that the destruction of the bridge damnified the turnpike company to the extent of the diminution of profits pending the rebuilding of the bridge; but such profits constituted but a mere expectation, lacking the legal basis necessary to support an insurable interest.⁹⁸

Insurable Interest Arising out of Contract Rights.

Any binding contract giving rights which will be injuriously affected by the destruction of any designated property will afford an insur-

MONTAGUE, *supra*. Under the Maryland statute enacted in 1842, the husband retains marital rights in his wife's realty, and has an insurable interest therein. *Mutual Fire Ins. Co. v. Deale*, 18 Md. 26, 79 Am. Dec. 673. See, also, *Harris v. Insurance Co.*, 50 Pa. 341, wherein it was said that the policy on the wife's property, taken out by the husband, might be also sustained on the ground of implied agency for the wife. See, further, *Clarke v. Insurance Co.*, 18 La. 431; *MERRETT v. INSURANCE CO.*, 42 Iowa, 11.

⁹⁵ *Clarke v. Insurance Co.*, *supra*; *Traders' Ins. Co. v. Newman*, *supra*.

⁹⁶ 77 Wis. 4, 45 N. W. 945, 8 L. R. A. 806. See, also, *MERRETT v. INSURANCE CO.*, *supra*.

⁹⁷ *Sweeny v. Insurance Co.*, 20 Pa. 337. But see *City of New York v. Brooklyn Fire Ins. Co.*, 41 Barb. (N. Y.) 231.

⁹⁸ *FARMERS' MUT. INS. CO. v. NEW HOLLAND TURNPIKE CO.*, 122 Pa. 37, 15 Atl. 563.

able interest in such property, even though the insurer may have neither interest in the property nor any specific lien upon it. A workman has an insurable interest in any building he may have contracted to repair, or an artist might insure the structure for the interior decoration of which he had been employed. In either case the accidental destruction of the building would discharge the contract, and thus damnify the workman to the extent of the value of his contract rights. So it has been held that a person who had been engaged as superintendent of a factory for a long term had an insurable interest in the factory.⁹⁹ Likewise a contractor, who had insured a house which he was engaged in moving, was held entitled to recover when the house was burned, before the completion of the work, to the extent of the compensation he was to have received under the contract.¹⁰⁰

Insurance of Property not in Existence. Profits.

It must be true that one cannot have insurable interest in property which does not exist. Nor is it correct to say that the possibility that property may come into existence in the future gives a present insurable interest therein. But the mere fact that property has no present existence affords no reason why a bona fide contract should not be made for its protection when it shall be subsequently acquired or come into being. Such expectant insurance may be said to be subject to a suspensory condition, and attaches to any specific property only upon its emerging into the realm of existent things. According to this view such insurance is in no wise opposed to public policy, but rather stands approved by it, since the principle of insurance is thereby adapted to the needs of modern business. Hence it may be broadly stated that a valid contract of insurance may be made for the future protection of property in which the insurer has no present right or interest whatever, and which may not even be in esse. Arnould¹⁰¹ states the rule to be that "an expectancy, coupled with a present existing title to that out of which the expectancy arises, is an insurable interest." Such a potential interest is necessary to the transfer of a legal title by sale or gift, but by no means necessary to the validity of a policy of insurance. It is well settled that a farmer may insure crops to be grown on land owned by him at the time of the issue of the policy, but such a limitation is without reason. He may just as properly insure the crops to be raised by him as "cropper" on the land of another, provided the crops will belong to him when produced. In *Sawyer v. Dodge Coun-*

⁹⁹ *Graham v. Insurance Co.*, 48 S. C. 195, 26 S. E. 323, 59 Am. St. Rep. 707.

¹⁰⁰ *Planters' & Merchants' Ins. Co. v. Thurston*, 93 Ala. 255, 9 South. 268. An insurance agent who receives, as compensation, a certain percentage of the net profits of the company, has an insurable interest in the property insured by that company. *Hayes v. Insurance Co.*, 170 Mass. 492, 49 N. E. 754.

¹⁰¹ 1 Arnould, Mar. Ins. § 256.

ty Mut. Ins. Co.,¹⁰² insurance upon crops to be grown during a period of five years was held to cover grain that was properly within the description of the policy, but which had been raised on land not owned by the insurer at the time of the execution of the policy. And the decision is eminently sound, although the court was at much needless pains to reconcile its holding with accepted rules as to what constitutes insurable interest.

Open policies of marine insurance covering cargoes not yet shipped, or even contracted for, are frequent, and uniformly enforced;¹⁰³ and similar policies upon changing stocks of goods on land are equally unquestioned.¹⁰⁴ Such policies are in no sense wagers. The insurance, by the very terms of the contract, cannot attach to the property until it is acquired by the insurer, when a manifest insurable interest arises.

Expected profits of a venture undertaken may be properly insured.¹⁰⁵ But there can be no recovery for loss of profits unless such profits are specifically covered by the policy. Expected profits cannot be proved as an element of loss suffered under a general policy upon the subject out of which the profits were expected to arise.¹⁰⁶ Under the American cases, it is not necessary for the insurer to show that profits specifically insured would probably have been made but for the loss of the venture;¹⁰⁷ but in England it is held that recovery may be had only to the extent of probable profits proved.¹⁰⁸

¹⁰² 37 Wis. 503; 5 Bennett, Fire Ins. Cas. 659.

¹⁰³ 1 Arnould, Mar. Ins. § 258. "It is everyday practice to insure goods on a return voyage, long before the goods are bought." Rhind v. Wilkinson, 2 Taunt. 237. See, further, Whitney v. Insurance Co., 3 Cow. (N. Y.) 210; Haven v. Gray, 12 Mass. 71. In Dow v. Insurance Co., 1 Hall (N. Y.) 366, the insurance was upon goods out, and "upon the proceeds thereof home," and it was held that the policy did not cover the same goods on their return voyage, but no question was made of the validity of the insurance.

¹⁰⁴ Hooper v. Insurance Co., 17 N. Y. 424; HOFFMAN v. INSURANCE CO., 32 N. Y. 405, 88 Am. Dec. 337; LANE v. INSURANCE CO., 12 Me. 44, 28 Am. Dec. 150; Lee v. Insurance Co., 11 Cush. (Mass.) 324. An insurance on "fixtures" placed or to be placed in certain buildings covers fixtures erected in the buildings subsequently to the issuance of the policy. New York Gas Light Co. v. Mechanics' Fire Ins. Co., 2 Hall (N. Y.) 125. In the case of reinsurance, whether marine (Boston Ins. Co. v. Globe Fire Ins. Co., 174 Mass. 229, 54 N. E. 543, 75 Am. St. Rep. 303) or fire (Sun Ins. Office v. Merz, 64 N. J. Law, 301, 45 Atl. 785, 52 L. R. A. 330), it is not essential to the validity of the policy that the insurable interest should exist at the time of effecting the reinsurance.

¹⁰⁵ BARCLAY v. COUSINS, 2 East, 544; Patapsco Ins. Co. v. Coulter, 3 Pet. (U. S.) 222, 7 L. Ed. 659.

¹⁰⁶ Niblo v. Insurance Co., 1 Sandf. (N. Y.) 551 (profits of theater); Matter of WRIGHT & POLE, 1 Adol. & E. 621. See Niagara Fire Ins. Co. v. Heslin (Ky.) 60 S. W. 393; Stock v. Inglis, L. R. 9 Q. B. Div. 708.

¹⁰⁷ Patapsco Ins. Co. v. Coulter, 3 Pet. (U. S.) 222, 7 L. Ed. 659; Loomis v. Shaw, 2 Johns. Cas. (N. Y.) 36; 1 Phillips, Ins. § 318.

¹⁰⁸ Hodgson v. Glover, 6 East, 316; Arnould Mar. Ins. (7th Ed.) § 287.

DURATION OF INTEREST.

48. In order that insurance on property shall be valid, an interest must exist in the insurer at the time of the loss. It is not necessary that an interest shall exist at the time of the issue of the policy; nor does the suspension of the insured's interest during the currency of the policy defeat a recovery if an interest has been reacquired before the loss occurs.

The books, both texts and reports, are full of statements to the effect that the insurer must possess an interest at the time insurance is procured on property, as well as at the time the loss occurs, in order to free the contract from the fatal fault of being a wager.¹⁰⁹ That such is generally considered to be the law is further evidenced by the provision of the California Civil Code¹¹⁰ which declares that "an interest insured must exist when the insurance takes effect and when the loss occurs, but need not exist in the meantime." But notwithstanding the great volume of authority to this effect, it seems that the existence of an insurable interest at the inception of the contract is not at all necessary to its validity, unless made so by such code provision as was referred to above. The generally prevailing opinion that a policy is void as a wager unless the insurer had an interest at the time of its issue seems to have had its origin in a dictum of Lord Hardwicke's in the ancient case of Sadlers' Co. v. Babcock,¹¹¹ in which that great judge said: "I am of opinion it is necessary the party insured should have an interest in property at the time of the insuring, and at the time the fire happens." The question before the court in this case was whether an insured should be allowed to recover when he had no interest in the property covered by the policy at the time of the fire, and the assertion that an interest at the time of insuring was necessary was as ill considered as it was uncalled for. But the doctrine so enunciated has been borne upon a full current of dictum down to modern times,¹¹² and has only recently come to be questioned. Yet from its

¹⁰⁹ The following are some of the cases in which this dictum has been reiterated. Chrisman v. Insurance Co., 16 Or. 283, 18 Pac. 466; Sheppard v. Insurance Co., 21 W. Va. 368; Carpenter v. Insurance Co., 16 Pet. (U. S.) 495, 10 L. Ed. 1044; Commercial Fire Ins. Co. v. Capital City Ins. Co., 81 Ala. 320, 8 South. 222, 60 Am. Rep. 162; Howard v. Insurance Co., 3 Denio (N. Y.) 301; Fowler v. Insurance Co., 26 N. Y. 422; Lockhart v. Cooper, 87 N. C. 149, 42 Am. Rep. 514; Clinton v. Insurance Co., 176 Mass. 486, 57 N. E. 998, 50 L. R. A. 833, 79 Am. St. Rep. 325.

¹¹⁰ Civ. Code, § 2552.

¹¹¹ SADLERS' CO. v. BABCOCK, 2 Atk. 554; Id., 1 Wills. 10, decided in 1743.

¹¹² See note 109, supra, and the very recent case, Ohio Farmers' Ins. Co. v. Vogel (Ind. Sup.) 65 N. E. 1056 [1903].

very origin this rule of law has had strange and illogical fellows. Thus it has never been questioned that an open marine policy may properly cover a return cargo to be purchased months after the time of the making of the policy.¹¹³ And later it became equally well established that a floating policy on a fluctuating stock of goods was enforceable so as to afford indemnity for the loss of after-acquired property.¹¹⁴ It is also well settled that, in the absence of special provision in the policy to the contrary, the alienation of insured property will not defeat a recovery under the policy if the insured has subsequently reacquired the property and possesses an insurable interest at the time of loss.¹¹⁵ These floating policies have been usually regarded as forming an exception to the general rule, and as being successors to the old marine "interest or no interest" policies¹¹⁶ of which Lord Hardwicke says:¹¹⁷ "The common law leant strongly against these policies for some time; but, being found beneficial to merchants, they winked at it."

But there is no real necessity for the courts of law to wink at these exceptional policies in the interest of business, as the exception gives the true rule. The sole purpose of the rule as generally stated is to prevent the issue of wager policies, and beyond this it should have no application. The policy of the law will not allow A. to insure the house of B., when he has no interest therein, for not only would such insurance be mere gambling in the probability of B.'s house being destroyed, but would also afford a strong temptation to A. feloniously to procure its destruction. Neither would the subsequent acquisition of B.'s house by A. validate a contract so thoroughly vicious in its inception.¹¹⁸ But there is no reason whatever why A., contemplating the purchase of B.'s house, should not take out a policy of insurance, under which the risk is to attach upon A.'s purchasing and thereby acquiring an interest in that house. The requirement of good faith and a real interest at the time of the loss is amply sufficient to satisfy the demands of public policy. Indeed public policy, which would ever encourage and protect industry and business of any legitimate kind, and frequently has forced the lagging rules of law to move forward to the support of advancing business usages, requires that such anticipatory insurances shall be favored and enforced. If a person were not allowed to insure property until after its acquisition, valuable business

¹¹³ See note 103, *supra*.

¹¹⁴ See note 104, *supra*.

¹¹⁵ *Rex v. Insurance Cos.*, 2 Phila. 357; *Id.*, 14 Leg. Int. 332. See the argument of Bigelow, C. J., in *WORTHINGTON v. BEARSE*, 12 Allen (Mass.) 382, 90 Am. Dec. 152. *Contra*, *Cockerill v. Insurance Co.*, 16 Ohio, 148.

¹¹⁶ Such insurances are prohibited by St. 19 Geo. II, c. 37.

¹¹⁷ See *SADLERS' CO. v. BABCOCK*, 2 Atk. 554, 556.

¹¹⁸ See note in 2 Am. Lead. Cas. 847.

interests must needs often go unprotected, since it is not always convenient or practicable to procure insurance at the time the interest is actually acquired, or within a reasonable time thereafter; as when a return cargo is shipped from a distant port, or when a merchant or warehouseman has goods that are gradually disposed of and as gradually replaced with others. So, to enforce strictly a rule requiring the interest protected to exist at the time the policy issues, would often defeat the very purpose for which insurance was designed. Thus if a "builder's risk" policy covered only the interest possessed by the insured at the time of issue, it would impose upon the careful builder the intolerable burden of taking out daily insurance. Consequently it is very properly held that the risk attaches under a builder's policy in proportion as the construction progresses, and the interest of the insured increases.¹¹⁹

The strong tendency of the courts to disregard the dicta, however positive, laying down the generally accepted rule, and to hold valid bona fide anticipatory insurance, is well indicated by the words of the Supreme Court of Vermont in the case of *Davis v. New England Fire Ins. Co.*:¹²⁰ "It is insisted by the defendant," says Taft, J., "that the declaration is defective, for that there is no allegation that the property insured was the property of the plaintiff at the time the policy was issued, citing *Dickerman v. Vermont Mut. Fire Ins. Co.*,¹²¹ in which it is said: 'It is essential to the sufficiency of the counts that they should allege an insurable interest in the plaintiffs at the time the policies were issued and also at the time of loss.' This is a general rule according to the current of decisions, and is applicable in all cases when it does not appear that there was any interest in nor ownership of the property from the time the policy was issued to the time of the loss. But a policy may be valid and attach to and cover property acquired subsequent to its delivery, and in such cases the rule above stated is modified, and an allegation that subsequent to the delivery of the policy the insured acquired an interest in the property which is the subject of the contract is sufficient. In *Hooper v. Robinson*,¹²² Mr. Justice Swayne cites 1 Arn. Ins. 238, viz.: 'It is now clearly established that an insurable interest, subsisting during the risk and at the time of loss, is sufficient, and that the insured need not allege nor prove that he was interested at the time of effecting the policy. Indeed, it is every day's practice to effect insurance in which the allegation could not be made with any degree of truth.' It is true that the

¹¹⁹ *Commercial Fire Ins. Co. v. Capital City Ins. Co.*, 81 Ala. 320, 8 South. 222, 60 Am. Rep. 162; *Ulmer v. Insurance Co.*, 61 S. C. 459, 39 S. E. 712; *Sullivan v. Insurance Co.*, 34 App. Div. 164, 54 N. Y. Supp. 629.

¹²⁰ 70 Vt. 217, 39 Atl. 1095.

¹²¹ 67 Vt. 99, 30 Atl. 808.

¹²² 98 U. S. 528, 25 L. Ed. 219.

quotation from Arnould approved by Mr. Justice Swayne referred solely to marine insurance, which only was considered in *Hooper v. Robinson*, but the breadth of the statement certainly suggests a broader application of the principle stated. The most recent case in which the question has been carefully considered is *Sun Fire Ins. Co. v. Merz*,¹²³ in which the New Jersey Court of Errors and Appeals reversed the decision of the Supreme Court, which had held that a policy of reinsurance was void because it provided indemnity for losses under policies thereafter to be written by the reinsured company. The conclusion of the court is thus stated by Gummere, J.: "Up to the present time the question has not received consideration at the hands of this court. An examination of the reasons upon which the earlier rule rests has led us to the conclusion that they are not well founded, and that a contract by which the parties provide for indemnity against loss by fire upon property to be subsequently acquired by the party indemnified is not in any sense a gaming contract, and void on that account; in other words, that an insurable interest, subsisting during the risk and at the time of the loss, is sufficient to support a policy insuring against loss by fire."¹²⁴

Unfortunately for the conclusiveness of this decision the policy in question was not an ordinary fire policy, but one of reinsurance, which is in its nature essentially a floating policy, and as such falls properly within the recognized exception to the rule as generally stated.

Finally, it may be safely stated as a conclusion from an examination of the authorities that only a very few cases have held policies otherwise valid void because of the absence of an insurable interest at the time of the issue;¹²⁵ and that the rule requiring the existence of such interest at the inception of the policy has no further meaning than, in the words of the learned editors of the *American Leading Cases*,¹²⁶ "that a policy intended as a wager will not be rendered valid by the subsequent acquisition of an interest in the property at risk."

¹²³ 64 N. J. Law, 301, 45 Atl. 785, 52 L. R. A. 330.

¹²⁴ See dictum to the contrary in *Ohio Farmers' Ins. Co. v. Vogel* (Ind. App.) 65 N. E. 1056.

¹²⁵ See *HOWARD v. INSURANCE CO.*, 11 Can. Sup. Ct. 92, criticised in *May, Ins.* § 101a.

¹²⁶ Volume 2, p. 847, note.

INSURABLE INTEREST IN LIVES.

49. A contract of life insurance not supported by an insurable interest is contrary to public policy, and void.
50. The existence of an insurable interest at the time when the policy is issued is sufficient. The subsequent termination of such interest before the maturity of the policy in no wise affects its validity.
51. Every person has an insurable interest in his own life, and may lawfully insure it for the benefit of his own estate, or in behalf of any other person. It is not necessary that such beneficiary shall possess an interest in the life insured.
52. A person may procure insurance on the life of another when he is so related to that other by reason of blood, marriage, or commerce that he has well-grounded expectations of deriving benefit from the continuation of that other's life, or of suffering detriment or incurring liability through its termination.

Wager Policies on Life.

As before stated, there seems little room to doubt that wager policies of life insurance, based on no interest in the assured, were enforceable in England prior to the enactment of the statutes of 19 Geo. II., c. 37, and 14 Geo. III., c. 48, by which such policies were prohibited.¹²⁷ The courts of the American states, however, have generally held, irrespective of statutes, that wager policies are contrary to public policy, and void.¹²⁸ In some cases it has been declared that the English stat-

¹²⁷ By chapter 48 of the latter statute it was enacted: "That from and after the passing of this act no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering; and that every assurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever."

¹²⁸ *Trinity College v. Travelers' Ins. Co.*, 113 N. C. 248, 18 S. E. 175, 22 L. R. A. 291; *Helmetag's Adm'r v. Miller*, 76 Ala. 183, 52 Am. Rep. 316; *SINGLETON v. INSURANCE CO.*, 66 Mo. 63, 27 Am. Rep. 321, disapproving a dictum to the contrary in *CHISHOLM v. INSURANCE CO.*, 52 Mo. 213, 14 Am. Rep. 414; *Whitmore v. Supreme Lodge*, 100 Mo. 36, 13 S. W. 495; *Guardian Mut. Life Ins. Co. v. Hogan*, 80 Ill. 35, 22 Am. Rep. 180; *Continental Life Ins. Co. v. Volger*, 89 Ind. 572, 46 Am. Rep. 185; *Burton v. Insurance Co.*, 119 Ind. 207, 21 N. E. 746, 12 Am. St. Rep. 405; *United Brethren Mut. Aid Soc. v. McDonald*, 122 Pa. 324, 15 Atl. 439, 1 L. R. A. 238, 9 Am. St. Rep. 111; *ROMBACH v. INSURANCE CO.*, 35 La. Ann. 233, 48 Am. Rep. 239; *Ruse v. Insurance Co.*, 23 N. Y. 516; *Warnock v. Davis*, 104 U. S. 775, 26 L. Ed. 924. See the strong language in *Brockway v. Insurance Co. (C. C.)* 9 Fed. 249. Early New York cases on marine insurance sustained the common-law rule upholding wager policies. See *Jubel v. Church*, 2 Johns. Cas. 333; *Buchanan v. Insurance Co.*, 6 Cow. 318; *Glendining v. Church*, 3 Caines,

utes were but declaratory of the common law,¹²⁹ but this can scarcely be true; and certainly not of the common law as determined on this point by the decisions of the English courts.¹³⁰ Indeed, it seems that in New Jersey policies without interest are still enforceable, on the theory that the common-law rule of decision to that effect remains unchanged by statute.¹³¹

When Such Interest Must Exist.

But it has been held that the requirements of 14 Geo. III. are satisfied by the presence of an interest in the assured at the inception of the policy, and that a decrease, suspension, or entire termination of that interest before the policy matures in no wise affects the assured's right of recovery under a policy valid at its inception.¹³² And the decisions of the American courts as to the continuance of interests,

141; 1 Phillips, Ins. 3, 4. But these cases must be regarded as substantially overruled by *RUSE v. INSURANCE CO.*, 23 N. Y. 516.

¹²⁹ *RUSE v. INSURANCE CO.*, 23 N. Y. 516; *Whitmore v. Supreme Lodge*, 100 Mo. 36, 13 S. W. 495. "It is generally agreed that mere wager policies—that is, policies in which the insured party has no interest whatever in the matter insured, but only an interest in its loss or destruction—are void as against public policy. This was the law of England prior to the Revolution of 1688. But after that period a course of decisions grew up sustaining wager policies. The Legislature finally interposed, and prohibited such insurance: First, with regard to marine risks, by St. 19 Geo. II, c. 37; and next, with regard to lives, by St. 14 Geo. III, c. 48"—*Mr. Justice Bradley*, in *CONNECTICUT MUT. LIFE INS. CO. v. SCHAEFER*, 94 U. S. 457, 460, 24 L. Ed. 251.

¹³⁰ That a wager, unaffected with any special cause of invalidity, is enforceable at common law, is shown by decisions since the enactment of this statute. In *Good v. Elliot*, 3 Term R. 693, a wager was sustained at common law, it being held that the case did not come within the purview of the statute. See *Andrews v. Herne*, 1 Lev. 33; *Walcott v. Tappin*, 1 Keb. 56, 65, cited by the court. In *British Ins. Co. v. Magie, Cooke & Alcock*, 182, a wager policy was sustained at common law, it being held that the statute was inapplicable to Ireland. The statute applies not only to policies on lives, but also to policies "on any other event or events whatsoever." And so, in *Roebuck v. Hammerton*, Cowp. 737, a wager upon the sex of a person was declared within the statute, the court taking care to show that the form of the wager was a policy. To the same effect is *Patterson v. Powell*, 9 Bing. 320. See, further, *Craufurd v. Hunter*, 8 Term R. 14, 23, per Grose, J.; *Cousins v. Nantes*, 3 Taunt. 513; *Abbott v. Sebor*, 3 Johns. Cas. (N. Y.) 39, 2 Am. Dec. 139, per Kent, J.

¹³¹ *Trenton Mut. Life & Fire Ins. Co. v. Johnson*, 24 N. J. Law, 576; *Martin v. Insurance Co.*, 38 N. J. Law, 140, 20 Am. Rep. 372; *VIVAR v. KNIGHTS OF PYTHIAS*, 52 N. J. Law, 455, 20 Atl. 36, 41. It would seem that the statute prohibiting wagers is not applied to insurance. See *Flagg v. Baldwin*, 38 N. J. Eq. 219, 48 Am. Rep. 308.

¹³² *DALBY v. ASSURANCE CO.*, 15 C. B. 365, *Richards' Cases*, 271, *Woodruff's Cases*, 7, overruling *GODSALL v. BOLDERO*, 9 East, 72, in which it was held that an insured creditor could not recover on the policy when the debt had been paid before suit brought, but after the death of the debtor.

without reference to the English statutes, are to the same effect.¹³³ Thus in *Dalby v. India & London Life Assur. Co.*,¹³⁴ an insurer was allowed to recover on a contract of reinsurance when the loss did not occur until long after the original policy, which served as a basis of interest for the reinsurance, had been canceled. So in *Connecticut Mut. Life Ins. Co. v. Schaefer*¹³⁵ the Supreme Court of the United States declared, although the point was not really in judgment, that a wife might enforce payment under a policy upon the life of her husband when his death occurred after she was divorced and married to another. "We do not hesitate to say, however," to quote from the opinion of Justice Bradley, "that a policy taken out in good faith, and valid at its inception, is not avoided by the cessation of the insurable interest, unless such be the necessary effect of the provision of the policy itself." Some doubt has been cast upon the generality of this principle by those cases which question the right of an assured creditor to recover more than the amount of his debt and charges.¹³⁶ But this note of uncertainty in the application of the general doctrine is believed to be due to misunderstood precedents and ill-considered dicta, and not to any direct decision repudiating the doctrine.¹³⁷

Insurance on Own Life—Beneficiary Need Have no Interest.

Life policies fall into two general classes. In one class are those taken out by the insured upon his own life, either for the benefit of himself or of his estate, in case it matures only at his death, or for the benefit of any person who may be designated as beneficiary; in the other are such policies as are taken out upon the life of another. In the first class of policies the question of insurable interest is of so little importance as to merit scant consideration. It is ordinarily said

¹³³ *Appeal of Corson*, 113 Pa. 433, 6 Atl. 213, 57 Am. Rep. 479; *Mowry v. Insurance Co.*, 9 R. I. 346; *RAWLS v. INSURANCE CO.*, 27 N. Y. 282, 84 Am. Dec. 280; *Overhiser's Adm'r v. Overhiser*, 63 Ohio St. 77, 57 N. E. 965, 50 L. R. A. 552, 81 Am. St. Rep. 612, following *CONNECTICUT MUT. LIFE INS. CO. v. SCHAEFER*, *infra*.

¹³⁴ *DALBY v. INDIA & LONDON LIFE ASSUR. CO.*, 15 C. B. 365. In *Law v. Policy Co.*, 1 Kay & J. 223, 24 L. J. Ch. N. S. 196, where a father purchased from his son a legacy contingent upon the son's attaining the age of 30 years, and insured the son's life for 2 years when the son wanted only 20 months of that age, the bona fides of the father in insuring for 2 years was left to the jury. It appeared that the son had arrived at the age of 30 years, but had died within the 2 years that the policy had to run, and that the father had received the legacy.

¹³⁵ *CONNECTICUT MUT. LIFE INS. CO. v. SCHAEFER*, 94 U. S. 457, 24 L. Ed. 251.

¹³⁶ *Exchange Bank v. Loh*, 104 Ga. 446, 31 S. E. 459, 44 L. R. A. 372; *Helmetag v. Miller*, 76 Ala. 183, 52 Am. Rep. 316; *First Nat. Bank v. Terry's Adm'r*, 99 Va. 194, 37 S. E. 843, 86 Am. St. Rep. 898, 55 L. R. A. 155, sub nom. *First Nat. Bank v. Speece*; *Cawthon v. Perry*, 76 Tex. 383, 13 S. W. 268.

¹³⁷ See *infra*, p. 410.

that every man has an insurable interest in his own life.¹³⁸ It were more accurate to say that the question of insurable interest is immaterial when the policy is upon the insured's own life. The presence of an insurable interest is really required only as evidence of the good faith of the parties, and it is contrary to human experience that a man should insure his own life for the purpose of speculation, or be tempted to take his own life in order to secure payment of money to some other, although instances of such gruesome fraud upon insurers are not wanting.¹³⁹ Consequently it is uniformly held that the mere fact of a man's insuring his own life for the benefit either of himself or of another is sufficient evidence of good faith to validate the contract. It is not at all necessary that the person designated as beneficiary in such policies should have any interest in the life insured.¹⁴⁰ It is true that such a beneficiary without interest will be subject to the same temptation to terminate unlawfully the life insured as if he himself had taken out the policy, and there are cases on record where such temptation has been yielded to;¹⁴¹ but the law considers this danger too slight for notice, since the selection of the beneficiary by the insured is, in ordinary cases, sufficient guaranty of the existence of such good faith and confidence between them as will sufficiently protect the insured.

In fact, in this class of policies, the indemnity feature of life insurance is so faint as to be scarcely traceable, and especially so where the policy is on the endowment plan, payable, after a certain period, to the insured. Such policies are little more than contracts of investment; and even where the proceeds of the policy are to be paid to another than the insured or his representative, the purpose of the agreement is chiefly for the investment and accumulation of the sums annually paid as premiums for the use of the designated beneficiary. Wherefore, in such cases, considerations touching indemnity and insurable interest may be disregarded.¹⁴²

¹³⁸ *Union Fraternal League v. Walton*, 109 Ga. 1, 34 S. E. 317, 46 L. R. A. 424, 77 Am. St. Rep. 350; *Provident Life Ins. & Inv. Co. v. Baum*, 29 Ind. 236; *Prudential Ins. Co. v. Hunn*, 21 Ind. App. 525, 52 N. E. 772, 69 Am. St. Rep. 390; *Northwestern Masonic Aid Ass'n v. Jones*, 154 Pa. 99, 26 Atl. 253, 35 Am. St. Rep. 810; *Albert v. Insurance Co.*, 122 N. C. 92, 30 S. E. 327, 65 Am. St. Rep. 693; *CAMPBELL v. INSURANCE CO.*, 98 Mass. 381; *Bloomington Mut. Ben. Ass'n v. Blue*, 120 Ill. 121, 11 N. E. 331, 60 Am. Rep. 558.

¹³⁹ See *RITTER v. INSURANCE CO.*, 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 698.

¹⁴⁰ *Sabin v. Phinney*, 134 N. Y. 423, 31 N. E. 1087, 30 Am. St. Rep. 681; *Elkhart Mut. Aid B. & R. Ass'n v. Houghton*, 103 Ind. 286, 2 N. E. 763, 53 Am. Rep. 514; cases cited in note 138.

¹⁴¹ See *Schmidt v. Association*, 112 Iowa, 41, 83 N. W. 800, 51 L. R. A. 141, 84 Am. St. Rep. 323.

¹⁴² Where the policy is issued to the insured, the beneficiary need neither allege nor prove an insurable interest. *Northwestern Masonic Aid Ass'n v.*

Insurance on the Life of Another—What Interest Sufficient.

But where one man assumes to insure the life of another the questions involved are strikingly different. To allow such insurances to be made by persons having no other interest in the continuance of the lives insured than springs from the prospect of making gain through their early termination, would be intolerable. The circumstances attending the making of the contract must be such as to prove the existence of a bona fide desire and interest on the part of the insurer that the life insured shall continue during its natural term. The circumstances that give evidence of such a desire are said to constitute an insurable interest. Therefore, by transposing terms, we have the statement made in accordance with the decisions, that an insurable interest exists whenever the relation between the assured and insured, whether by blood, marriage, or commercial intercourse, is such that the assured has a reasonable expectation of deriving benefit from the continuation of the life insured, or of suffering detriment or incurring liability through its termination.¹⁴³ Or, put more briefly, the policy of the law requires that the assured shall have an interest to preserve the life insured in spite of the insurance, rather than to destroy it because of the insurance. As has been shown heretofore,¹⁴⁴ the authorities do not require that the expectation of the benefit to be derived shall have a legal basis, nor that the benefit shall be susceptible of pecuniary estimation. The benefit must, however, be valuable and not merely sentimental.¹⁴⁵ Neither is the amount or character of the advantage hoped for any measure of the amount for which insurance may be procured, excepting the case of insurance by a creditor.¹⁴⁶ To quote again from the leading case of *Connecticut Mut. Life Ins. Co. v. Schaefer*:¹⁴⁷ "But precisely what interest is necessary, in order to take a policy out of the category of mere wager, has been the subject of much discussion. In marine and fire insurance the difficulty is not so great, because there insurance is considered as strictly

Jones, 154 Pa. 99, 26 Atl. 253, 35 Am. St. Rep. 810. But where the beneficiary takes out the policy directly from the insurer, such allegation and proof is necessary. *Continental Life Ins. Co. v. Volger*, 89 Ind. 572, 46 Am. Rep. 185.

¹⁴³ *WARNOCK v. DAVIS*, 104 U. S. 775, 26 L. Ed. 924; *Appeal of Corson*, 113 Pa. 438, 6 Atl. 213, 57 Am. Rep. 479; *United Brethren Mut. Aid Soc. v. McDonald*, 122 Pa. 324, 15 Atl. 439, 1 L. R. A. 238, 9 Am. St. Rep. 111; *ROMBACH v. INSURANCE CO.*, 35 La. Ann. 283, 48 Am. Rep. 239.

¹⁴⁴ See p. 100, *supra*.

¹⁴⁵ *Guardian Mut. Life Ins. Co. v. Hogan*, 80 Ill. 35, 22 Am. Rep. 180; *ROMBACH v. INSURANCE CO.*, *supra*; *Continental Life Ins. Co. v. Volger*, 89 Ind. 572, 46 Am. Rep. 185.

¹⁴⁶ A creditor's policy is treated by some authorities as a contract of pure indemnity. See p. 411, *infra*.

¹⁴⁷ *CONNECTICUT MUT. LIFE INS. CO. v. SCHAEFER*, 94 U. S. 457, 460, 24 L. Ed. 251, *Woodruff's Cases*, 59.

an indemnity. But in life insurance the loss can seldom be measured by pecuniary standards. Still, an interest of some sort in the insured life must exist. A man cannot take out insurance on the life of a total stranger, nor on that of one who is not so connected with him as to make the continuance of the life a matter of some real interest to him. The essential thing is, that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the insured has no interest." It may thus be seen that while a policy on the life of another is not a contract of indemnity, and that the real requirement for its validity is the good faith of the parties, yet it is based on the theory of indemnity in its inception.¹⁴⁸

Examples of Insurable Interest in Life—Relationship.

While there is some obiter authority to the contrary,¹⁴⁹ it seems now well settled that mere relationship, however close, is not sufficient

¹⁴⁸ "It [a contract of life insurance] is not a contract of indemnity for actual loss, but a promise to pay a certain sum on the happening of a future event from which loss or detriment may ensue, and if made in good faith for the purpose of providing against a possible loss, and not as a cloak for a wager, is sustained by any interest existing at the time the contract is made." *W. Allen, J., in MUTUAL LIFE INS. CO. v. ALLEN*, 138 Mass. 24, 52 Am. Rep. 245.

¹⁴⁹ Thus, in *Valley Mut. Life Ass'n v. Teewalt*, 79 Va. 421, 422, it was said by Hinton, J., that "it is now well settled that a father has an insurable interest in the life of his child, whether a minor or of full age, and the child in the life of his father." In this case the policy had been taken out by the father on his own life, and was made payable to his son. The policy being based on the father's insurable interest in his own life, the question whether the son had an interest in his father's life was not before the court. For the same reason the statement in *Crosswel v. Association*, 51 S. C. 103, 28 S. E. 200, that "a son has an insurable interest in the life of his mother, on account of relationship alone," was a mere dictum. The decision in *Equitable Life Ins. Co. v. Hazelwood*, 75 Tex. 338, 12 S. W. 621, 7 L. R. A. 217, 16 Am. St. Rep. 893, was based, not on the blood relationship (brothers) between the insured and assured, but on the relation of debtor and creditor. The case of *ÆTNA LIFE INS. CO. v. FRANCE*, 94 U. S. 561, 24 L. Ed. 287, has sometimes been cited (see two cases next above) for the statement that close ties of blood may give an insurable interest. But in this case the question was expressly waived. Chew had taken out the policy on his own life for the benefit of his sister, to whom he was indebted. She advanced the money to pay the premiums. The relationship was considered only as showing the bona fides of the parties. In *RESERVE MUT. INS. CO. v. KANE*, 81 Pa. 154, 22 Am. Rep. 741, the insurable interest of a son in his father's life was based upon the provision of the poor law making children liable for the support of their indigent parents. See a criticism of this case in *Life Ins. Clearing Co. v. O'Neill*, 106 Fed. 800, 45 C. C. A. 641, 54 L. R. A. 225. The decision in *LOOMIS v. INSURANCE CO.*, 6 Gray (Mass.) 396, was rested on the father's right to the earnings of his minor son, which is, of course, a valuable pecuniary interest.

alone to constitute an insurable interest.¹⁵⁰ But a legal right to require services or to receive benefit of whatever kind is sufficient to validate insurance upon the life of a near relative, even though such

¹⁵⁰ A demurrer to a complaint, based upon a policy of insurance, alleging that the assured is the daughter of the insured, should have been sustained for want of an allegation of insurable interest. *Continental Life Ins. Co. v. Volger*, 89 Ind. 572, 46 Am. Rep. 185. The relation of father and son, coupled with affectionate regard for each other, and the moral obligation of the father to compensate the son for his labor, are only facts tending to show an insurable interest of the son in his father's life. An instruction that these facts did give the son an insurable interest was held error. *Guardian Mut. Life Ins. Co. v. Hogan*, 80 Ill. 35, 22 Am. Rep. 180. In *Prudential Ins. Co. v. Hunn*, 21 Ind. App. 522, 52 N. E. 772, 69 Am. St. Rep. 390, the question arose upon a demurrer to the complaint. The only allegation touching insurable interest was that the insured was plaintiff's son, and it was held that the demurrer should have been sustained. In *Life Ins. Clearing Co. v. O'Neill*, 106 Fed. 800, 45 C. C. A. 641, 54 L. R. A. 225, it was held that under the facts in evidence plaintiff had not from the bare fact of relationship an insurable interest in the life of his father. Says Manning, J., in *ROMBACH v. INSURANCE CO.*, supra: "The books formulate the general principle somewhat in this way: When the insurable interest arises or is implied from relationship, it will be deemed to exist when the relationship is such that the insurer has a legal claim upon the insured for services or support. Even though such legal claim does not exist, yet where, from the personal relations of the two, and the kindness and good feeling displayed by the insured to the insuree, the latter has a reasonable right to expect some pecuniary advantage from the continuance of the life of the former, or to fear loss from his death, an insurable interest will be held to exist." The dictum in *WARNOCK v. DAVIS*, 104 U. S. 775, 26 L. Ed. 924, accords with this view. In that oft-quoted passage Mr. Justice Field says: "It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest arising from the relations of the party obtaining the insurance, either as creditor or of surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation, for a parent has an insurable interest in the life of his child, and a child in the life of his parent, a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful—as operating more efficaciously—to protect the life of the insured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the insured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are therefore, independently of any statute on the subject, condemned as being against public policy." The doctrine as thus announced seems clearly to amount to merely this: An insurable interest in the life of another need not rest upon any pecuniary or contractual relations to that other, but whatever the relation, whether pecuniary or of blood or affinity, it must furnish reasonable ground "to ex-

services may not be actually rendered;¹⁵¹ or any loss or liability that will be incurred by reason of the death of such relative.¹⁵² So a mere expectation of benefit to be received from the insured relative is sufficient, even where such expectation has no basis of legal right.¹⁵³ Thus a parent may insure the life of his minor child, to whose services he is entitled,¹⁵⁴ but not that of an adult child, unless, perchance, he has under some statute a right to look to such child for support, or ac-

pect some benefit or advantage from the continuance of the life of the assured." Certainly by "benefit or advantage" was meant some substantial, material—some pecuniary—advantage or benefit, and not any sentimental benefit arising from the gratification of the feelings of love and affection for the insured by the continuance of his life. See *Life Ins. Clearing Co. v. O'Neill*, 106 Fed. 800, 45 C. C. A. 641, 54 L. R. A. 225. "The relationship, therefore, seems to be of little importance, except as tending to give rise to the circumstances which justify the expectation."

¹⁵¹ In a case where the plaintiff had made advances to the insured to enable him to prospect for gold in California, *Woodruff, J.*, said: "It is urged that it in no wise appears that the efforts of R. H. Miller would have produced any pecuniary benefit to the plaintiff. So it may be said to the wife, non constat that your husband will support you if he lives; or to the creditor, non constat that your debtor would have been either able or willing to pay you had he lived; or to a master, non constat but that the labor of your apprentice would have been unproductive, or but that infirmity or vice in him would have made a continuance of the relation a burden to you instead of a profit. The law does not proceed upon any such speculation as to possible results. There is a legal presumption of benefit in all these cases, because there is a claim to what is in its nature beneficial." *Miller v. Insurance Co.*, 2 E. D. Smith (N. Y.) 268. In *New York* the mother, equally with the father, is entitled to the expected services of her infant child, and this is an insurable interest. *O'Rourke v. Insurance Co.*, 10 Misc. Rep. 405, 31 N. Y. Supp. 130. But where it is affirmatively shown that the services could never have been rendered, as where the wife was a hopeless maniac or invalid at the time the policy was issued, it has been questioned whether an insurable interest would be held to exist. *CURRIER v. INSURANCE CO.*, 57 Vt. 496, 52 Am. Rep. 134. Cf. *People's Mut. Ben. Soc. v. Templeton*, 16 Ind. App. 126, 44 N. E. 809. See, also, *Mitchell v. Insurance Co.*, 45 Me. 104, 71 Am. Dec. 529.

¹⁵² *Law v. Policy Co.*, 3 Eq. 388, 1 Kay & J. 223; *Scott v. Dickson*, 108 Pa. 6, 56 Am. Rep. 192. In this case it was held that a surety on an official bond had an insurable interest in the life of his principal.

¹⁵³ *CRONIN v. INSURANCE CO.*, 20 R. I. 570, 40 Atl. 497. In this case it appeared that an aunt and her niece lived together in amicable and affectionate relations. Each had reason to rely on the other in case of need, and upon this ground the aunt was held to have an insurable interest in the life of her niece. See *Carpenter v. Insurance Co.*, 161 Pa. 9, 28 Atl. 943, 23 L. R. A. 571, 41 Am. St. Rep. 880; *LORD v. DALL*, 12 Mass. 115, 7 Am. Dec. 38.

¹⁵⁴ *Mitchell v. Insurance Co.*, 45 Me. 104, 71 Am. Dec. 529; *LOOMIS v. INSURANCE CO.*, 6 Gray (Mass.) 396. The rule seems to be otherwise in England. It is there held that the word "interest," as used in St. 14 Geo. III, c. 48, means pecuniary interest. See *HALFORD v. KYMER*, 10 Barn. & C. 724. Cf. *Law v. Policy Co.*, 1 Kay & J. 223, 2 Bigelow L. & Acc. Rep. 404.

tually receives support from him. So a minor child has an insurable interest in the life of a parent to whom he may look for education and support, but an adult son, living apart from and independently of his father, has no insurable interest in the latter's life, in the absence of special circumstances justifying an expectation of future benefit,¹⁵⁵ and the same is true of insurance procured by a daughter on the life of her mother.¹⁵⁶

That provision of the poor laws of some of the states by which persons having sufficient ability are required to maintain their lineal kindred materially affects the question of insurable interest between persons so related. Plainly one may insure the life of a kinsman to whom he may look for support under such laws, provided it appears that the person whose life is insured has the ability to render the support.¹⁵⁷ And it seems to be the generally accepted rule that a policy may be validly taken out on the life of a kinsman to cover expenditures actually made in the support of the insured, or those necessarily to be made in the future.¹⁵⁸ But the Pennsylvania court has gone still further, and held that the mere possibility of having to incur such expenditures under the statute constitutes a sufficient insurable interest. "Maintenance of a father or mother unable to work is, therefore, a legal liability. When we add to this the feelings of natural affection and the desire produced by these feelings to provide for the comforts of parents, the right to effect an insurance on the life of the parent, to carry out these purposes, ought not to be denied. It would be technical in the extreme to say that a son has no insurable interest in his father's life. Poverty may overtake the father in his lifetime, and thus both father and mother be cast upon the son; or, if the father die before her, the necessity may fall at once upon the son. Why, then, should he not be permitted to make a provision, by insurance, to reimburse himself for his outlays, past or future? What injury is done to the insurance company? They receive the full premium, and they know in such case, from the very relationship of the parties, that the contract is not a mere gambling adventure, but is founded in the best feelings of our nature, and on a legal duty which

¹⁵⁵ *Guardian Mut. Life Ins. Co. v. Hogan*, 80 Ill. 35, 22 Am. Rep. 180; *Life Ins. Clearing Co. v. O'Neill*, 106 Fed. 800, 45 C. C. A. 641, 54 L. R. A. 225.

¹⁵⁶ *Continental Life Ins. Co. v. Volger*, 89 Ind. 572, 46 Am. Rep. 185; *Prudential Ins. Co. v. Hunn*, 21 Ind. App. 525, 52 N. E. 772, 69 Am. St. Rep. 380.

¹⁵⁷ *Life Ins. Clearing Co. v. O'Neill*, 106 Fed. 800, 45 C. C. A. 641, 54 L. R. A. 225. In this case, however, there was no proof of the father's probable ability to support his son, and a judgment sustaining the policy was reversed. To same effect, see *People's Mut. Ben. Soc. v. Templeton*, 16 Ind. App. 126, 44 N. E. 809. See *Hurd v. Doty*, 86 Wis. 1, 56 N. W. 371, 21 L. R. A. 746.

¹⁵⁸ *Life Ins. Clearing Co. v. O'Neill*, *supra*.

may arise at any time. We are of the opinion that the policy is not void."¹⁵⁹

On principle it is difficult to see how even the actual expenditure of money, or the immediate liability to pay, can give any insurable interest in the life of the indigent and dependent relative. The death of the insured will but relieve the assured of his burden, and from a merely pecuniary point of view will unquestionably be a benefit to the assured, and not a source of detriment, excepting so far as it may impose liability for funeral expenses. Manifestly the theory of the Pennsylvania court, as expressed in *Mutual Reserve Ins. Co. v. Kane*, just cited, that the assured should be allowed by insurance to reimburse himself for outlays, past or future, is unsound. Life insurance is not a profit-making transaction to the assured. The premiums payable in each case are so calculated that if the life insured continues as long as the average expectancy of one of similar age and health, the amount paid in premiums, with interest, will exceed the amount ultimately realized from the policy. Hence, unless the assured had fraudulent secret knowledge of conditions that would probably terminate the life insured at an earlier period than that fixed by the mortuary tables, it would be thoroughly unwise for him to hope to regain his expenditures on behalf of the dependent relative by insuring his life.

A sister may insure the life of a brother from whom she receives, or expects to receive, support,¹⁶⁰ but not otherwise.¹⁶¹ The mere relation of brothers,¹⁶² or of uncle and nephew, or aunt and nephew,¹⁶³

¹⁵⁹ *RESERVE MUT. INS. CO. v. KANE*, 81 Pa. 154, 22 Am. Rep. 742.

¹⁶⁰ *LORD v. DALL*, 12 Mass. 115, 7 Am. Dec. 38. See the rather unsatisfactory opinion on this question in *Goodwin v. Insurance Co.*, 73 N. Y. 480, 493.

¹⁶¹ The unqualified statement in *Hosmer v. Welch*, 107 Mich. 470, 67 N. W. 504, that "at the common law the defendant had an insurable interest in her brother's life," is an obiter dictum. The policy was issued to the brother.

¹⁶² *Lewis v. Insurance Co.*, 39 Conn. 104, 3 Bigelow L. & Acc. Ins. Rep. 527. In this case Carpenter, J., said: "We think it is a correct legal proposition that the mere relationship of a brother is not such an interest as will support a policy of life insurance. The interest required to make such a contract valid must be of a pecuniary nature. A few cases will be cited by way of illustration. A father, being entitled to the wages of his minor son, has an insurable interest in his life. *LOOMIS v. INSURANCE CO.*, 6 Gray (Mass.) 396. A sister, dependent upon a brother for her education and support, has an insurable interest in the brother's life. *LORD v. DALL*, 12

¹⁶³ *SINGLETON v. INSURANCE CO.*, 66 Mo. 63, 27 Am. Rep. 321. An uncle living on his sister's place, and keeping his nephew, the child of his sister, has no insurable interest in such child. *Prudential Ins. Co. v. Jenkins*, 15 Ind. App. 297, 43 N. E. 1056, 57 Am. St. Rep. 228. A nephew has no insurable interest in the life of his aunt by force of the mere relationship. *Appeal of Corson*, 113 Pa. 438, 6 Atl. 213, 57 Am. Rep. 479. See, also, *Mowry v. Insurance Co.*, 9 R. I. 353, 1 Bigelow L. & Acc. Ins. Rep. 698.

or grandfather and grandson,¹⁶⁴ will not constitute an insurable interest. There must be some further reason for expecting pecuniary advantage from the continued life of the insured than the mere kindly or affectionate feeling naturally existent between such near relatives. It has further been held that a mere moral obligation to support or render other service is not sufficient of itself. There must be either a legal right or a well-grounded expectation of benefit to be conferred. Thus in *Guardian Mut. Life Ins. Co. v. Hogan*¹⁶⁵ it was held that the moral obligation resting upon the father to reimburse the son for labor and money expended in improvements on the father's land did not give the son such an interest as would validate a policy on the father's life. But the existence of such moral obligation may, in connection with near relationship and kindly feeling, be evidence of a well-grounded expectation of advantage to be derived from the continuation of the life of the person upon whom such obligation rests, which will constitute a sufficient interest. Thus where an aunt and niece had lived together like mother and daughter for many years, the aunt supporting and caring for the niece, it was held that the aunt had an insurable interest in the life of the niece, since she had reason to expect, from the kindly feelings that subsisted between them, that the niece would perform the moral obligation imposed upon her by those circumstances to care for and support the aunt in case of need.¹⁶⁶

The conclusion to be reached from an examination of the cases is that, despite the positive tone of the persistent dicta to the contrary, the fact of near relationship does not of itself constitute an insurable interest, and is of importance only as affording evidence of the existence of a legal right to demand maintenance, or of a reasonable hope

Mass. 115, 7 Am. Dec. 38. A person advancing money to another, in consideration of which he acquires an interest by contract in his future services, may protect that interest by an insurance on his life. *BEVIN v. INSURANCE CO.*, 23 Conn. 244. From these and many other cases that might be cited, it is apparent that the plaintiff might have had an insurable interest in the life of his brother. He might have been dependent upon him for his support. He might have had a fixed pecuniary interest in his future services. He might have been a creditor. The defendants could not know from the application that the plaintiff did not have a pecuniary interest in the continuance of his brother's life. The policy, therefore, on its face, is not void, but prima facie valid, and could only be avoided upon proving, by parol evidence, a want of interest." But, so it has been held, a brother has an insurable interest in the life of a sister whom he supports and maintains in his family. *Keystone Mut. Ass'n v. Beaverson*, 16 Wkly. Notes Cas. (Pa.) 188.

¹⁶⁴ *Burton v. Insurance Co.*, 119 Ind. 207, 21 N. E. 746, 12 Am. St. Rep. 405. A mother-in-law has no insurable interest in the life of her son-in-law. *Adams v. Reed* (Ky.) 36 S. W. 568.

¹⁶⁵ 80 Ill. 35, 22 Am. Rep. 180.

¹⁶⁶ *CRONIN v. INSURANCE CO.*, 20 R. I. 570, 40 Atl. 497.

of future benefit arising out of the kindly feeling and benevolent disposition usually incident to such relationship.

The Relation of Husband and Wife.

There would seem to be no proper question as to the right of either spouse to insure the life of the other. The wife has a legal right to support from the husband,¹⁶⁷ and, under the common law, the husband has a right to the services of his wife.¹⁶⁸ Even under the modern married women's laws, by which the wife is entitled to retain her own earnings, it is clear that the husband's expectation of services to be rendered by the wife in and about the common household would give him an insurable interest in her life. And it would seem that the mere right to the wife's services will support a policy on her life taken out by the husband, without actual proof that the right was of value. In a Vermont case, however, it was intimated that proof of the inability of the wife to render such services, as when she is hopelessly insane or an invalid, might require the application of a different rule.¹⁶⁹

Commercial Relations.

Any person is permitted to protect by insurance any commercial interest he may possess in the life of another. A creditor may insure

¹⁶⁷ *Reed v. Assurance Co.*, Peake, Add. Cas. 70; *MUTUAL LIFE INS. CO. v. ALLEN*, 138 Mass. 24, 52 Am. Rep. 245. In the latter case it appeared that a wife had taken out a policy on the life of her husband, and had assigned it to plaintiff. The policy was enforced, the court assuming, without discussion, that the wife had an insurable interest in her husband's life. In *ROMBACH v. INSURANCE CO.*, 35 La. Ann. 233, 48 Am. Rep. 239, Manning, J., said: "It is thoroughly settled, because universally held, that a wife has an insurable interest in the life of her husband, and although, in that case especially, it might be assumed that love and affection furnished a sufficient basis for it, the decisions do not place it on that ground, but rather on the support she is entitled to from him." Dicta to the same effect are numerous. See *Crotty v. Insurance Co.*, 144 U. S. 621, 12 Sup. Ct. 749, 36 L. Ed. 566. Statutes, permitting the wife to take out insurance on her husband's life, and exempting the proceeds thereof from the payment of his debts, have been enacted in nearly all of the states. See 4 Rev. St. N. Y. (8th Ed.) p. 2602; Code Ala. 1896, § 2356. A wife under a common-law marriage has an insurable interest in the life of her husband. *Watson v. Insurance Co. (C. C.)* 21 Fed. 698. In this case the husband had taken out the policy, but the court did not consider this fact. See, also, *Equitable Life Assur. Soc. v. Paterson*, 41 Ga. 338, 5 Am. Rep. 535. A woman has an insurable interest in the life of her fiancé. *CHISHOLM v. INSURANCE CO.*, 52 Mo. 213, 14 Am. Rep. 414; *Taylor v. Insurance Co.*, 15 Tex. Civ. App. 254, 39 S. W. 185. And it has been held that a mistress had an insurable interest in the life of her paramour. *Lampkin v. Insurance Co.*, 11 Colo. App. 249, 52 Pac. 1040.

¹⁶⁸ This constitutes an insurable interest. *CURRIER v. INSURANCE CO.*, 57 Vt. 496, 52 Am. Rep. 134.

¹⁶⁹ *Id.*

the life of his debtor,¹⁷⁰ a partner that of his copartner,¹⁷¹ or a servant the life of his master.¹⁷² And a master may insure his servant against such injuries in the course of his employment as will impose liability on the master.¹⁷³ The life of a contractor under obligation to construct any work may be insured by his employer, and persons pecuniarily interested in any financial enterprise may insure the life of the financier who has charge of it.¹⁷⁴ The life of one only indirectly connected with a commercial enterprise may be insured by those involved in it if the death of such person would injuriously affect the enterprise, as in the recent instances of insurance on the life of the King of England procured by those who had invested money in preparations for the King's coronation. So a tenant *pur autre vie* might well insure the life of his *cestui que vie*;¹⁷⁵ and one who owns a property interest contingent upon another's attaining some specified age may through insurance secure indemnity for the loss he would suffer by the death of that other before arriving at that age.¹⁷⁶

A surety may insure the life of his principal, for the latter is but a

¹⁷⁰ *BEVIN v. INSURANCE CO.*, 23 Conn. 244; *RAWLS v. INSURANCE CO.*, 27 N. Y. 282, 84 Am. Dec. 280; *MORRELL v. INSURANCE CO.*, 10 Cush. (Mass.) 282, 57 Am. Dec. 92; *Shaffer v. Spangler*, 144 Pa. 223, 22 Atl. 865; *Walker v. Larkin*, 127 Ind. 100, 26 N. E. 684; *Mace v. Association*, 101 N. C. 132, 7 S. E. 674; *Equitable Life Ins. Co. v. Hazelwood*, 75 Tex. 338, 12 S. W. 621, 7 L. R. A. 217, 16 Am. St. Rep. 893. And the creditor retains an insurable interest in the life of his debtor after the debt is barred by the statute of limitations. *RAWLS v. INSURANCE CO.*, *supra*. A creditor may insure the life of his infant debtor, even though the infant may avoid the obligation. *Porter on Ins.* 69, citing *Dwyer v. Edie*, 2 Park. Ins. 914.

¹⁷¹ "Certainly Luchs had a pecuniary interest in the life of Dillenberg on two grounds: Because he was his creditor, and because he was his partner. The continuance of the partnership, and, of course, a continuance of Dillenberg's life, furnished a reasonable expectation of advantage to himself. It was in the expectation of such advantage that the partnership was formed, and, of course, for the like expectation, was continued." Mr. Justice Field in *CONNECTICUT MUT. LIFE INS. CO. v. LUCHS*, 108 U. S. 498, 2 Sup. Ct. 949, 27 L. Ed. 800.

¹⁷² *Hebdon v. West*, 3 Best & S. 579.

¹⁷³ *EMPLOYERS' LIABILITY ASSUR. CORP. v. MERRILL*, 155 Mass. 404, 29 N. E. 529. An employer's insurance against his liability for the negligent killing of his employé is essentially different from an insurance of the life of an employé. See *American Employers' Liability Ins. Co. v. Fordyce*, 62 Ark. 562, 36 S. W. 1051, 54 Am. St. Rep. 305.

¹⁷⁴ It is currently reported in the newspapers that insurance to a large amount is carried upon the life of Mr. J. P. Morgan by stockholders of enterprises of which that financier has charge. See *Mechanics' Nat. Bank v. Comins (N. H.)* 55 Atl. 191.

¹⁷⁵ A tenant of a landlord having only a life estate in the leased premises has an insurable interest in such landlord's life. *Sides v. Insurance Co. (C. C.)* 16 Fed. 650.

¹⁷⁶ *Law v. Policy Co.*, 3 Eq. 388, 1 Kay & J. 223, 2 Bigelow L. & Acc. Ins. Rep. 404.

conditional debtor,¹⁷⁷ but the principal has no such interest in the life of his surety.¹⁷⁸ Likewise it has been held that a building association has no insurable interest in the life of a member who is in no wise indebted to it.¹⁷⁹

INTEREST OF CREDITOR IN LIFE OF DEBTOR.

53. The interest of the creditor in the life of the debtor is measured by the amount of the debt. The insurance effected by the creditor upon such an interest, while not limited to the amount of the debt, will not be allowed so to exceed that sum as to justify an inference that it was taken out as a wager. Therefore creditor's insurance to an amount unreasonably greater than the debt is illegal and void.

Debtor and Creditor—Amount of Insurance.

It is well settled that a creditor has an insurable interest in the life of his debtor,¹⁸⁰ but it is difficult to ascertain from the authorities just what is the nature of that interest, and what is the principle on which is to be determined the proportion which the amount of insurance procured shall bear to the amount of the debt. It is clear that insurance limited to the exact amount of the debt will fail to indemnify the creditor, in case the debtor dies before the debt is paid, by an amount equal to the sum of all premiums paid, with interest thereon.¹⁸¹ On the other hand, it is equally clear that to allow the creditor to procure insurance greatly exceeding the amount of the debt would be to tempt him to bring the debtor's life to an unnatural end, and thus contravene the principle of public policy which has been seen to lie at the very basis of the doctrine of insurable interest. And that this fear of inducing crime is not an idle one is apparent from the experience of insurance companies, as sometimes reflected in the reported cases.¹⁸²

¹⁷⁷ *Scott v. Dickson*, 108 Pa. 6, 56 Am. Rep. 192; *Embry's Adm'r v. Harris*, 104 Ky. 61, 52 S. W. 958.

¹⁷⁸ *Tate v. Association*, 97 Va. 74, 33 S. E. 382, 45 L. R. A. 243, 75 Am. St. Rep. 770.

¹⁷⁹ *Id.* A religious society, supported largely by voluntary contributions from its members, has no insurable interest in the life of such a member. *Trinity College v. Insurance Co.*, 113 N. C. 244, 18 S. E. 175, 22 L. R. A. 291.

¹⁸⁰ See note 170, *supra*.

¹⁸¹ "He [the creditor] must be allowed to provide for a sum sufficient, when collected, to cover his demand, and such disbursements as may be required to keep the policy in force, with accrued interest." *Henry, J.*, in *Equitable Life Ins. Co. v. Hazelwood*, 75 Tex. 338, 12 S. W. 621, 7 L. R. A. 217, 16 Am. St. Rep. 893.

¹⁸² See *Reg. v. Flanagan*, 15 Cox, Cr. Cas. 411. In this case it appeared that a woman, having lent divers sums to several persons, secured the loan

The courts have generally not attempted to lay down any precise or arbitrary rule fixing the proportion of valid insurance to the debt intended to be secured, but have contented themselves with stating broadly that when the disproportion between the insurance and the debt is so great as to show the transaction to be really a wager, and not a bona fide effort to secure a debt, the policy shall be void.¹⁸³ In effect each case has been decided on its own facts, and the proportionate amounts of debt and insurance are merely evidential of the good or bad faith of the creditor procuring the insurance. Thus a policy of \$3,000 to secure a debt of \$70 was held manifestly dishonest and void;¹⁸⁴ while, under the peculiar circumstances of another case, insurance to the amount of \$6,500 was held not to be so disproportionate to a debt of \$1,000 as to avoid the contract.¹⁸⁵

The Pennsylvania decisions, however, attempt to formulate a rule to govern the proportion between the insurance and the debt as follows: The creditor may insure the life of his debtor in an amount equal to the sum of the debt, plus all the premiums payable during the debtor's life expectancy according to the Carlisle tables, with interest on the debt and premiums during that time.¹⁸⁶ This rule, however, though approved in several successive decisions,¹⁸⁷ is wholly impracticable and valueless. The premiums payable upon any policy, with annual interest thereon, during the insured's life expectancy, will alone always amount to a sum equal to or greater than the proceeds of the policy,

by insurance on their lives, and then poisoned them to secure the insurance money.

¹⁸³ See the opinion of Miller, J., in *Cammack v. Lewis*, 15 Wall. (U. S.) 643, 21 L. Ed. 244.

¹⁸⁴ *Cammack v. Lewis*, 15 Wall. 643, 21 L. Ed. 244. In this case it appeared that the debtor procured the policy, and, in pursuance of a previous agreement with his creditor, assigned it to him to secure the debt of \$70. The assignee creditor agreed to pay to the insured's wife \$1,000 out of the proceeds of the policy. The court declared the assignment invalid because of the great disproportion between the debt and the insurance. See *CONNECTICUT MUT. LIFE INS. CO. v. LUCHS*, 108 U. S. 498, 2 Sup. Ct. 949, 27 L. Ed. 800. In *Corson's Appeal*, 113 Pa. 438, 6 Atl. 213, 57 Am. Rep. 479, a policy for \$2,000, to cover a debt of \$743, was sustained. In *Grant's Adm'r v. Kline*, 115 Pa. 618, 9 Atl. 150, the policy was for \$3,000, the debt \$743, and the transaction was declared valid. There were circumstances, however, evidencing the good faith of the creditor. In *Cooper v. Weaver's Adm'r (Pa.)* 11 Atl. 780, a policy for \$3,000, to secure a debt of \$100, was declared void as a wager. To same effect, see *Cooper v. Shaeffer (Pa.)* 11 Atl. 548.

¹⁸⁵ *RITTTLER v. SMITH*, 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844.

¹⁸⁶ *Ulrich v. Reinhoehl*, 143 Pa. 238, 22 Atl. 862, 13 L. R. A. 433, 24 Am. St. Rep. 534.

¹⁸⁷ This rule was proposed in *Grant's Adm'r v. Kline*, *supra*, was spoken of approvingly in *Cooper v. Shaeffer*, *supra*, was adopted in *Ulrich v. Reinhoehl*, and reaffirmed in *Shaffer v. Spangler*, 144 Pa. 223, 22 Atl. 865.

leaving no margin for the debt. If it were otherwise, insurance companies could not possibly meet their obligations.¹⁸⁸

Hence the only working rule would seem to be that when the disproportion between the insurance and the debt is so great, taken with the other circumstances of the case, as to show a want of good faith in the creditor, the policy will be deemed a wager contract, and void.¹⁸⁹

INTEREST OF THE ASSIGNEE OF A LIFE POLICY.

54. On principle, and according to the clear weight of authority, an assignment of a life policy to one having no insurable interest therein is perfectly valid if made in good faith, and not as a cover for fraudulent speculation in life.

The validity of the assignment of a life policy to one having an insurable interest in the life insured is unquestionable, but there is much conflict of authority and consequent confusion in the law as to whether a valid assignment of a life policy can be made to one having no insurable interest. This confusion is due partly to the difficult nature of the principles involved, and partly to the misleading opinion delivered by Mr. Justice Field, of the Supreme Court of the United States, in the correctly decided case of *Warnock v. Davis*,¹⁹⁰ following the preceding case of *Cammack v. Lewis*,¹⁹¹ decided by the same court. These confusing influences have further been aided and abetted by a catch phrase, which, however, does not state the issue fairly, to the effect that the law will not allow a person to procure by assignment insurance that he could not procure directly.¹⁹² A fair statement of the issue is found in the postulate that the law will allow the

¹⁸⁸ See the exposition of the fallacy of this rule by Lumpkin, P. J., in *Exchange Bank v. Loh*, 104 Ga. 446, 31 S. E. 459, 44 L. R. A. 372.

¹⁸⁹ A third view of this question is expressed in *Equitable Life Ins. Co. v. Hazelwood*, 75 Tex. 333, 12 S. W. 621, 7 L. R. A. 217, 16 Am. St. Rep. 893. In this case Henry, J., said: "When the insurance is obtained by a person on his own life, and made payable originally, or by assignment, to another, having none, or only a limited insurable interest in his life, as the surplus after the payment of the charges will go to the party whose life is assured, we see no reason for limiting the amount for which the insurance may be taken out. When the insurance is not contracted for by the person whose life is insured, but by a creditor, in his own name, so that there is no party to the contract except himself and the insurer, it becomes immaterial what amount may be contracted for, as no more will be collected than will be ultimately sufficient to discharge his debt and disbursements on the policy, including interest upon both."

¹⁹⁰ *WARNOCK v. DAVIS*, 104 U. S. 775, 782, 26 L. Ed. 924, Elliott, Cas. 71.

¹⁹¹ 15 Wall. (U. S.) 643, 21 L. Ed. 244.

¹⁹² *WARNOCK v. DAVIS*, *supra*.

insured to designate a beneficiary under the policy as well by assignment as by original nomination.

The true principle governing the question may be derived from the statement of some generally accepted rules of law:

(1) A person insuring his own life may designate any person whatever as beneficiary, irrespective of insurable interest in that beneficiary.

(2) The law requires an insurable interest only at the inception of the policy, as evidence of good faith. The presence of such interest at any subsequent period is wholly immaterial.

(3) Life insurance, though based on the theory of indemnity at its inception, is not a contract of indemnity, but chiefly of investment. As a chose in action it has at any time after its issue a recognized value, termed the "reserve value."

Hence we conclude that a policy of life insurance, validly issued to one having an insurable interest, becomes in his hands a valuable chose in action, which should be assignable as any other property right, unless such assignment be opposed to some clear rule of public policy; that this right remains unimpaired in the hands of the original assured, even after the termination of the interest upon which its procurement was based, and there can be no sufficient reason for requiring an interest in the assignee which is not possessed by the assignor; and, finally, that there is no sufficient reason why the beneficiary designated by assignment of the policy after its valid issue should be subject to a different rule as to interest required from that applying to the beneficiary designated at the time of the issue of the policy. Since an insurable interest is not necessary in the latter, neither should it be required of the former.

But in considering the doctrine that an assignment to one having no insurable interest is valid, it is important to note two qualifying phases that materially affect the rights of the assignee. An assignment in form will not be allowed to operate as a mere cloak to conceal a wager in reality. Again, assignments may be absolute or conditional. A conditional assignment made to secure a debt cannot possibly give to the assignee any rights in the proceeds of the policy in excess of his interest, measured by the debt secured, with interest and the charges incurred on account of the policy. Upon these two propositions all authorities are agreed. Yet critical examination of the numerous cases that lay down the rule that an assignment to one having no interest is invalid, and that the assignee can retain the proceeds of the assigned policy only to the extent of his interest, discloses the fact that in nearly all of them the assignment in question was either a cloak for gambling insurance, or a conditional assignment to secure a debt. This appears strikingly in the misleading leading case of *Warnock v.*

Davis.¹⁹³ Here one Crosser applied for insurance, being moved thereto by an agreement, made on the same day with the application, by the Scioto Trust Association, to maintain the policy, and to pay all charges connected with it, in consideration of receiving an assignment entitling them to collect the sum due under the policy upon the death of Crosser, and, after paying 10 per cent. of such sum to Crosser's widow, to retain absolutely the balance. In accordance with this agreement, the policy was assigned the day succeeding its issue, and upon Crosser's death, some 18 months later, the assignees collected the amount payable under the policy, and retained nine-tenths of the sum collected. Upon suit by Crosser's administrator it was very properly held that the assignees could retain only so much of the proceeds of the policy as was necessary to reimburse them for their outlay in respect to it; that the assignment operated merely to secure the payment of money loaned for the payment of premiums.

It would be difficult to imagine a case showing more clearly than this a purpose to evade the rule of law forbidding wager policies, and to obtain indirectly insurance that the law would not allow directly. The real effect of the transaction was precisely the same as if the association had directly procured insurance upon the life of Crosser, in which they had absolutely no interest. The decision of the court, therefore, in refusing to uphold such a masquerading assignment, was eminently just and proper. But the court unfortunately went far beyond the case decided, and made various general observations, which apply equally well to cases entirely different from the one giving occasion to them, and have on that account been productive of much loose thinking and confusing adjudication. "The assignment of a policy," says Field, J., "to a party not having an insurable interest, is as objectionable as the taking out of a policy in his name. Nor is its character changed because it is for a portion merely of the insurance money. To the extent in which the assignee stipulates for the proceeds of the policy beyond the sums advanced by him, he stands in the position of one holding a wager policy. The law might be readily evaded, if the policy, or an interest in it, could, in consideration of paying the premiums and assessments upon it, and the promise to pay upon the death of the assured a portion of its proceeds to his representatives, be transferred so as to entitle the assignee to retain the whole insurance money."

The case of *Roller v. Moore's Adm'r*,¹⁹⁴ decided by the Virginia Court of Appeals in 1889, and often cited as authority for the doctrine that an assignment of a life policy to one having no insurable interest is invalid, is typical of that class of cases which make an unnecessary ex-

¹⁹³ *WARNOCK v. DAVIS*, 104 U. S. 775, 26 L. Ed. 924, Elliott, Cas. 71.

¹⁹⁴ 86 Va. 512, 10 S. E. 241, 6 L. R. A. 136.

tension to absolute assignments of the principle properly applicable to conditional assignments. In that case *Roller* had obtained from the insured an assignment of a policy on his life, which, though absolute on its face, was yet proved to have been given merely as security for money advanced by *Roller* to pay the premiums on the policy. Under these facts the court properly decided that the assignment was really conditional, and that the assignee could retain only so much of the proceeds of the policy as would reimburse him for all sums he had paid on account of the policy, with interest thereon. Under the facts of this case any other decision would have been impossible. It must have been the same if the assignment had been of any other chose in action. But the court, not content with correctly deciding the case before it, proceeded to lay down obiter a rule for absolute assignments, which is declared to be the same, in effect, as that for conditional assignments. Echoing the dictum in *Warnock v. Davis*, the court says: "The assignment of a policy, however, to a party not having an insurable interest, is as objectionable as the taking out of a policy in his name." The Virginia court has lost no opportunity in subsequent decisions to re-echo this dictum in *Roller v. Moore's Adm'r*, although in every case the assignment was shown to be conditional.¹⁹⁵

In like manner it will be found that in nearly all the cases that lay down the rule that an assignment to one without interest is invalid, the real question before the court for decision involved a conditional assignment. On the other hand, there are numerous cases fairly presenting for decision the rights of parties under an absolute assignment, in which the courts of many different states have held, after careful consideration, that no interest in the assignee is necessary to support the validity of an assignment of a life policy that has been validly taken out by one having such interest. Among the states that have adopted this view are the great commercial states, New York,¹⁹⁶ Pennsylvania,¹⁹⁷ Massachusetts,¹⁹⁸ Connecticut,¹⁹⁹ Illinois,²⁰⁰ Indiana,²⁰¹ Ohio,²⁰² New Jersey,²⁰³ and Maryland,²⁰⁴ as well as Iowa,²⁰⁵ Louisi-

¹⁹⁵ See *Tate v. Association*, 97 Va. 74, 33 S. E. 382, 45 L. R. A. 243, 75 Am. St. Rep. 770, and cases therein cited.

¹⁹⁶ *STEINBACK v. DIEPENBROCK*, 158 N. Y. 24, 52 N. E. 662, 44 L. R. A. 417, 70 Am. St. Rep. 424.

¹⁹⁷ *Cunningham v. Smith's Adm'r*, 70 Pa. 450.

¹⁹⁸ *Shea v. Association*, 160 Mass. 289, 35 N. E. 855, 39 Am. St. Rep. 475; *King v. Cram (Mass.)* 69 N. E. 1049.

¹⁹⁹ *Fitzgerald v. Insurance Co.*, 56 Conn. 116, 13 Atl. 673, 17 Atl. 411, 7 Am. St. Rep. 288.

²⁰⁰ *Martin v. Stubbings*, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 625.

²⁰¹ *Metropolitan Life Ins. Co. v. Brown (Ind. Sup.)* 65 N. E. 908.

²⁰² *Eckel v. Renner*, 41 Ohio St. 232.

²⁰³ *VIVAR v. KNIGHTS OF PYTHIAS*, 52 N. J. Law, 455, 20 Atl. 38.

²⁰⁴ *RITTNER v. SMITH*, 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844.

²⁰⁵ *Farmers' & Traders' Bank v. Johnson (Iowa)* 91 N. W. 1074.

ana,²⁰⁶ Mississippi,²⁰⁷ New Hampshire,²⁰⁸ Tennessee,²⁰⁹ Rhode Island,²¹⁰ South Carolina,²¹¹ Vermont,²¹² and Wisconsin.²¹³ The English²¹⁴ and Canadian²¹⁵ courts have also adopted the same rule.

In *Mutual Life Ins. Co. v. Allen*,²¹⁶ which repudiated the apparently contrary holding of the same court in *Stevens v. Warren*,²¹⁷ Allen, J., so well expresses the reasons why the assignee need have no insurable interest that his words may well be quoted here: "The other objection urged is that such transactions may lead to gaming contracts. This does not meet the question, which is whether such an assignment is in itself illegal as a wagering contract. Most contracts have an element of gambling in them. There is uncertainty in the value of any contract to deliver property at a future day, and great uncertainty in the present value of an annuity for a particular life, or of a sum payable in the event of a particular death, and such contracts and rights are often used for gambling purposes. The question is whether the right to a sum of money, payable on the death of a person under a contract in the form of an insurance policy, has any special character or quality which renders it less assignable than the right to a sum payable at the death of the same person under any other contract or assurance, or than a remainder in real estate expectant on such death. We see nothing in the contract of life insurance which will prevent the assured from selling his right under the contract for his own advantage, and we are of the opinion that an assignment of a policy made by the assured in good faith for the purpose of obtaining its present value, and not as a gaming risk between him and the assignee, or a cover for a contract of insurance between the insurer and assignee, will pass the equitable interest of the assignor; and that the fact that the assignee has no insurable interest in the life insured is neither conclusive nor prima facie evidence that the transaction is illegal."

²⁰⁶ *Hearing's Succession*, 26 La. Ann. 326.

²⁰⁷ *Murphy v. Red*, 64 Miss. 614, 1 South. 761, 60 Am. Rep. 63.

²⁰⁸ *Mechanics' Nat. Bank v. Comins* (N. H.) 55 Atl. 191.

²⁰⁹ *Mutual Protection Ins. Co. v. Hamilton*, 5 Sneed (Tenn.) 269.

²¹⁰ *Clark v. Allen*, 11 R. I. 439, 23 Am. Rep. 496.

²¹¹ *Crosswel v. Association*, 51 S. C. 103, 28 S. E. 200.

²¹² *Fairchild v. Association*, 51 Vt. 613.

²¹³ *Bursinger v. Bank*, 67 Wis. 75, 30 N. W. 290, 58 Am. Rep. 843.

²¹⁴ *ASHLEY v. ASHLEY*, 3 Sim. 149.

²¹⁵ *Vezina v. Insurance Co.*, 6 Can. Sup. Ct. 30.

²¹⁶ *MUTUAL LIFE INS. CO. v. ALLEN*, 138 Mass. 24, 52 Am. Rep. 245.

²¹⁷ 101 Mass. 564.

CONSENT OF THE LIFE INSURED.

55. While the practice of insurers makes the question somewhat uncertain, it seems that both by reason and authority insurance written upon the life of one who has not consented thereto is contrary to public policy, and void.

The Consent of the Insured.

It seems not to be yet clearly settled whether the consent of the insured is necessary to the validity of a policy procured by another, especially in view of the undoubtedly extensive practice of insurers now to grant insurances to large amounts on the lives of persons who have no knowledge of the contract and have given no consent to it. Policies upon the lives of infants are not of infrequent occurrence. Such policies are necessarily issued without examination of the life insured, or other means of ascertaining the character of the risk. Hence the element of pure chance, suggestive of speculation and gambling, is large in these contracts. It is generally reported that large amounts of insurance were taken by tradesmen and others interested, on the life of Queen Victoria prior to her jubilee celebration, and on the life of the present king of England before his recent coronation. It is likewise said that large insurances were procured on the life of a prominent New York financier during the pending of certain large financial operations of which he had charge. In none of these cases is it probable that the person whose life was the subject of insurance was consulted or examined with a view to determining the state of his health.

On clear principle, and by the weight of authority, it is believed that all such contracts are contrary to public policy, and void.²¹⁸ As has been shown heretofore, the amount of insurance that may be val-

²¹⁸ In *Metropolitan Life Ins. Co. v. Smith*, 59 S. W. 24, 22 Ky. Law Rep. 868, 53 L. R. A. 817, it was held that where a wife insures her husband's life without his knowledge or consent, and pays the premiums out of money given her by him for household expenses, such premiums are recoverable by him. The doctrine of the previous case of *Metropolitan Life Ins. Co. v. Monohan*, 102 Ky. 13, 42 S. W. 924, that it is contrary to public policy for one to procure an insurance on the life of another without such other's consent, was reaffirmed. To similar effect, see *Metropolitan Ins. Co. v. Trende*, 53 S. W. 412, 21 Ky. Law Rep. 909; *Metropolitan Life Ins. Co. v. Sehlhorst*, 53 S. W. 524, 21 Ky. Law Rep. 912. In *Metropolitan Life Ins. Co. v. Blesch* (Ky.) 53 S. W. 436, it appeared that a daughter had insured her father's life without his knowledge or consent, not knowing that such insurance is void as contrary to public policy. She was allowed to recover the premiums as paid under a mistake of law. In *Chicago Guaranty Fund Life Soc. v. Dyon*, 79 Ill. App. 100, it was declared that a policy of insurance on the life of a father, issued, without his knowledge or consent, to his son, was void as contrary to public policy.

idly procured is not limited strictly to the amount of the pecuniary interest to be protected. A margin must be allowed to cover premiums and other charges. But this excess of insurance offers a strong temptation to hasten the death of the insured by criminal means. The danger to the public from such insurances is largely obviated when the insured, with knowledge of all the circumstances, has given his consent to the contract. His very consent is strong evidence of the good faith of the person procuring the insurance, and thus affords a needed guaranty to society. Remove this consent, and there is no guaranty of the good faith of the assured, or of the safety of the life insured. The especial necessity of guarding the lives of rulers and other prominent persons whose lives are usually the subjects of this illicit insurance emphasizes the value of a rule of law that would prohibit such doubtful and corrupting contracts, and remove a very real public danger.²¹⁹

²¹⁹ Cases have arisen in which persons whose lives were insured without their consent have demanded the cancellation of the policies because of their distrust of the assured. See *ROMBACH v. INSURANCE CO.*, 35 La. Ann. 233, 48 Am. Rep. 239.

CHAPTER V.

THE MAKING OF THE CONTRACT.

- 56. In General—Offer and Acceptance.
- 57-59. The Form Required—Oral Contracts.
 - 60. When an Oral Contract Becomes Complete.
 - 61. Contracts in Writing.
- 62-63. Informal Written Contracts.
 - 64. Formal Written Contracts—The Policy.
 - 65. When the Policy Becomes Binding.
 - 66. Delivery.
 - 67. Payment of First Premium.
 - 68. What Papers Form the Written Contract.
 - 69. Same—Mutual Benefit Insurance.

IN GENERAL—OFFER AND ACCEPTANCE.

56. The contract of insurance, like any other contract, is complete and binding only when an offer made by one party is accepted by the other in the terms in which it is made. Neither the offer nor the acceptance, however, need be in any particular form. Any acts or words showing an intention to make an offer and to give an acceptance are sufficient to establish a binding contract.

The contract of insurance, like any other contract, becomes complete only when the minds of the parties have met in a common intention to be bound in accordance with certain terms. An offer communicated with contracting intent must within a reasonable time be accepted in the terms in which it is made, and that acceptance properly communicated. The familiar rules of general contract law determining what constitutes a contractual offer or a valid acceptance apply fully to the special contract of insurance. For a discussion of such rules or their general applications, the reader is referred to treatises on contracts. They will here be noticed only with reference to the phases peculiar to the insurance contract.

In the conduct of the insurance business there has been developed a customary method of making insurance contracts. The offer is made by the person desiring the insurance, who signs a written application containing such information concerning the subject of the proposed insurance as may be desired by the insurer. This application is delivered to a soliciting agent of the insurer, whose powers are usually limited to receiving such application and forwarding it to the general offices of the insurer, where it is either rejected or accepted. By the terms of the offer, the acceptance, however, is not ordinarily

complete until the issue and delivery of a policy and payment of the first premium. When the preliminary negotiations take such form, there is seldom any difficulty in determining when the contract is complete. The policy contains the contract, which, by its terms, goes into effect only when delivered without condition. And all preliminary negotiations and agreements are merged in the written policy.

But this usual course of procedure may be departed from. It may be that the insurer offers a contract which is accepted by the insured with or without writing, or the agent to whom the application for insurance is made may have authority to accept the offer without reference, and this acceptance may be written or oral. Even though restrictions have been put upon the agent's power, they may be invalid because of repugnancy, or because waived by the conduct of the insurer. In these and numerous other irregular cases it often becomes a difficult task to determine at what time an insurance contract becomes complete. In this determination two considerations are of paramount importance: First, the intention of the parties, and, second, the authority of the parties, as agents, to carry out that intention. Of course, expression must be given to this intention; and we shall now consider the form which this expression must assume, reserving the discussion of the powers of agents for a later chapter.

THE FORM REQUIRED—ORAL CONTRACTS.

57. It is well settled that, in the absence of statutes to the contrary, an oral contract of insurance is valid, with the possible exception of guaranty insurance.
58. Oral contracts concerning insurance may be of two kinds, which must be carefully distinguished.
- (a) A contract of present insurance made without writing confers the same rights and imposes the same obligations as does a written contract.
 - (b) An oral contract thereafter to make a contract of insurance gives to one of the parties a right to demand of the other the execution of an insurance contract in accordance with the usual terms, and the delivery of a policy as written evidence thereof.
59. By implication, the oral contract of present insurance includes all the terms of the policy expected subsequently to issue, or, in some states, prescribed by statute. But an executory agreement to make a contract is not subject to the conditions of the contemplated policy. In the one case the insurer incurs liability upon the happening of the loss insured against; in the other, upon his failure to deliver a policy as agreed.

The numerous and complex provisions of the usual contract of insurance, and the long terms for which insurance is sometimes granted, make it eminently desirable that the terms of this important contract

should be fixed in writing. Hence arose a general commercial usage that required the insurance contract to assume the form of a written policy. The formal dignity of the policy was sometimes enhanced by placing it under seal. The existence of this custom, and the fact that the contract was one properly belonging to the law merchant, led the learned author of an early work on marine insurance¹ to express the opinion that an action on an oral contract of insurance would not now be sustained. This view was adopted in full by the Ohio Court of Appeals, which declared in an early case that "such a thing as a verbal policy is unknown to the law of insurance, and the books upon the subject and the decisions unite in declaring that a policy must be in writing."² But it is now settled beyond question that, in the absence of statutory requirements to the contrary, an oral contract of insurance is valid and enforceable.³ The argument from commercial usage was thus met by the court in the leading case of *Sanborn v. Fireman's Ins. Co.*:⁴ "It is not easy to see the force of the reasoning which would infer that, because parties usually make their contract in one way, it would be void when they choose to make it in another, equally good at common law, and not prohibited by statute." Indeed, a usage that an oral contract should be invalid unless in writing would be contrary to law, as adding terms to the statute of frauds, and evidence tending to prove such usage would be inadmissible.⁵ But the fact that such contracts are customarily in writing will raise a strong presumption that no contract exists when there has been no policy delivered or premium paid.⁶

Not within the Statute of Frauds.

The contract of insurance, even though by its terms extending over many years, does not come within that provision of the statute of

¹ Duer, *Ins.* p. 60; Miller, *Ins.* p. 30.

² *Cockerill v. Insurance Co.* (1847) 16 Ohio, 148. This declaration, however, was obiter, as the insurer's charter required its contracts to be in writing. And it seems to have been repudiated in later Ohio cases. See *Dayton Ins. Co. v. Kelly* (1873) 24 Ohio St. 345, 15 Am. Rep. 61; *Newark Mach. Co. v. Kenton Ins. Co.*, 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768. In *Bell v. Insurance Co.* (1843) 5 Rob. (La.) 423, 39 Am. Dec. 542, it is also stated that an insurance contract must be in writing. But this is pure dictum. So in *Platho v. Insurance Co.*, 38 Mo. 254.

³ *Newark Mach. Co. v. Kenton Ins. Co.* (1893) 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768, and note, *Woodruff, Ins. Cas.* 93; *Haskin v. Insurance Co.*, 78 Va. 700; *Pacific Mut. Ins. Co. v. Shaffer*, 30 Tex. Civ. App. 313, 70 S. W. 566; *Commercial Union Assur. Co. v. Urbansky* (Ky.) 68 S. W. 653; *Woody v. Insurance Co.*, 31 Grat. (Va.) 362, 31 Am. Rep. 739.

⁴ 16 Gray (Mass.) 448, 77 Am. Dec. 419.

⁵ See *Emery v. Insurance Co.* (1885) 138 Mass. 398.

⁶ See *Equitable Life Assur. Soc. v. McElroy* (1897) 83 Fed. 631, 28 C. C. A. 365. But see dissenting opinion of Caldwell, J.

frauds requiring contracts not to be performed within one year from the making thereof to be in writing. The insurer becomes liable to perform his contract immediately upon the happening of the loss to be indemnified, which may easily be within a year.⁷ It has been held that a contract of reinsurance is a promise to answer for the debt of another,⁸ but this is contrary to both reason and authority.⁹ Contracts of guaranty insurance, however, would seem possibly within the statute, so as to require writing.

Statutory and Charter Provisions.

We have thus seen that at common law an oral contract of insurance is valid and binding. We have next to consider the effect of legislative enactments upon this doctrine. Such enactments modifying the common-law rule may assume two forms. They may be contained in general statutes governing all insurance contracts, by whomsoever made, or they may be found in the charters of corporate insurers, thus affecting only the contracts of those corporations.¹⁰

It is competent for the legislature to require all insurance contracts to be in writing, and in some states statutes to this effect have been passed.¹⁰ But statutes regulating the form of such contracts are in derogation of common right, and must be strictly construed. Therefore, it is held that a statute prescribing a standard form of policy does not invalidate oral contracts, but merely subjects such oral insurances to the conditions of the standard policy.¹¹

Revenue Laws Requiring Policies to be Stamped.

Revenue laws are usually held not to affect the validity of instruments required to be stamped, but merely the admissibility of such

⁷ *Sanborn v. Insurance Co.*, 16 Gray (Mass.) 448, 77 Am. Dec. 419; *Sanford v. Insurance Co.* (1899) 174 Mass. 416, 54 N. E. 884, 75 Am. St. Rep. 358; *Franklin Fire Ins. Co. v. Colt*, 20 Wall. (U. S.) 560, 22 L. Ed. 423; *Croft v. Insurance Co.*, 40 W. Va. 508, 21 S. E. 855, 52 Am. St. Rep. 902; *Phoenix Ins. Co. v. Splers*, 87 Ky. 286, 8 S. W. 453; *Wiebeler v. Insurance Co.* (1883) 30 Minn. 464, 16 N. W. 363; *Woodruff, Ins. Cas.* 79.

But where an agent agrees to issue policies on certain goods each year during a number of years in the future, the agreement is within the statute of frauds. *Klein v. Insurance Co. (Ky.)* 57 S. W. 250.

⁸ *Egan v. Insurance Co.*, 27 La. Ann. 368.

⁹ See *Commercial Mut. Ins. Co. v. Union Mut. Ins. Co.*, 19 How. (U. S.) 318, 15 L. Ed. 636.

¹⁰ See section 2794, Code Ga. 1882; *Simonton v. Insurance Co.* (1874) 51 Ga. 76.

¹¹ *HICKS v. ASSURANCE CO.* (1900) 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424. So a statute invalidating any terms of a policy printed in type smaller than a designated size would not affect the validity of an oral contract. See Code Va. 1887, § 3252; *Burruss v. Association*, 96 Va. 543, 32 S. E. 49. So of a statute requiring the application to be attached to the policy. *RITTER v. INSURANCE CO.*, 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693.

instruments as evidence. Manifestly, oral contracts are not thereby prohibited.¹² The federal revenue law of 1898 provided that if any of the instruments required by that law to be stamped, among which were insurance policies, should be issued without a stamp with intent to evade the law, such instrument should not only be inadmissible as evidence in any court, but should also "be deemed invalid and of no effect." The previous federal revenue acts, passed during and immediately after the Civil War, contained similar provisions. By the great weight of authority it has been held that the rule of evidence laid down by these acts has no application to the state courts, being confined to the federal courts.¹³ Nor, it seems, does the omission of a required stamp, even with intent to evade the law, render such unstamped instrument void, as it is not within the powers of Congress to enforce its revenue laws by declaring void contracts recognized as valid by the laws of the state.¹⁴

Restrictions upon Contract by Charter Provisions.

The charter of a corporate insurer is the law of its existence and the measure of its powers.¹⁵ It is manifestly within the power of the creating state to impose upon its corporate creature such limitations as to the mode of contracting as may seem to it proper. Therefore, if a provision in its charter prohibits it from making a contract otherwise than in writing, its oral contracts will be ultra vires and invalid.¹⁶ But such oral contracts are deemed to be prohibited only when the

¹² *Fish v. Cottenet*, 44 N. Y. 538, 4 Am. Rep. 715. In an ill considered Kansas case it was held that the revenue law required writing and a stamp to validate the contract. *Western Massachusetts Ins. Co. v. Duffey*, 2 Kan. 347.

¹³ *Knox v. Rossi* (Nev. 1900) 57 Pac. 179, 48 L. R. A. 305, 83 Am. St. Rep. 566, and note collating cases. See especially luminous opinion in *Carpenter v. Snelling* (1867) 97 Mass. 452; *Talley v. Robinson's Assignee*, 22 Grat. (Va.) 888; *Wingert v. Zeigler*, 91 Md. 318, 46 Atl. 1074, 51 L. R. A. 316, 80 Am. St. Rep. 453; *Garland v. Gaines* (1901) 73 Conn. 662, 49 Atl. 19, 84 Am. St. Rep. 182, and note. In Pennsylvania a different view is taken, and unstamped instruments are held inadmissible. *Chartiers & R. Turnpike Co. v. McNamara* (1872) 72 Pa. 278, 13 Am. Rep. 673.

¹⁴ *Moore v. Moore*, 47 N. Y. 467, 7 Am. Rep. 466; *Southern Ins. Co. v. Estes*, 106 Tenn. 472, 62 S. W. 149, 52 L. R. A. 915, 82 Am. St. Rep. 892; *Latham v. Smith*, 45 Ill. 31; *Hunter v. Cobb*, 1 Bush (Ky.) 239.

As to effect of English revenue laws, see *Morgan v. Mather*, 2 Ves. Jr. 18; 1 Joyce, Ins. § 33.

¹⁵ By the earlier common-law rule, corporations could contract only under corporate seal. 1 Bl. Comm. 475. But it is now well settled that they may contract freely by parol, unless prohibited from so doing. *Bank of Columbia v. Patterson*, 7 Cranch (U. S.) 299, 3 L. Ed. 351; *Clark, Corp.* 157.

¹⁶ *Head v. Insurance Co.*, 2 Cranch (U. S.) 150, 2 L. Ed. 229. A consideration of the rights of the insurer under such agreements raises the difficult question of the effect of ultra vires contracts of corporations, which cannot here be discussed. See *Clark, Corp.* 157, 170, et seq.

legislature clearly so intended. And even when oral contracts of insurance are clearly prohibited, it is held that the insurer may still make valid oral preliminary contracts to insure.¹⁷

Such are the holdings when the charter expressly or by necessary implication prohibits contracts by parol. A very different rule applies when the charter authorizes contracts in writing, and their execution by certain designated officers. Such provisions are held to be enabling, and directory in their purpose of regulating the internal management of the corporation and the conduct of its business, rather than as mandatory, and limiting usual powers of contracting.

Thus in a leading case in the Supreme Court of the United States, in which an article of the insurer's charter authorized the president or other officer appointed by the board of directors to make contracts of insurance "in and by policy of insurance in writing, to be signed by the president or other officer and secretary of the company," Justice Bradley used the following language:¹⁸ "The substantial power given by law to an association organized under it is to make insurance against loss and damage by fire. The mode and form in which it shall make its contracts is not prescribed as an essential part of its being or mode of action. The expressions referred to are not of that character. They indicate, in language chosen by the company itself, and not by the legislature, the ordinary mode of conducting its business. After having, by its officers and agents, made a parol contract of insurance, and induced the insured party, acting in good faith, to rely on its engagements, it cannot be permitted to shelter itself behind any such ambiguous expressions in its charter, and claim to have a special statute of frauds for its own benefit."

There are numerous other cases involving charters that contain similar provisions, and holding that they do not invalidate oral insurances.¹⁹

Several Kinds of Oral Insurance Contracts.

Having now established the validity in modern law of oral contracts of insurance,²⁰ it is fitting that we next determine the kinds of such contracts, and the character of the rights secured under them. These oral contracts concerning insurance will be found to fall into

¹⁷ *Constant v. Insurance Co.* (1861) 3 Wall. Jr. 316, Fed. Cas. No. 3,136; *Franklin Fire Ins. Co. v. Colt*, 20 Wall. (U. S.) 560, 22 L. Ed. 423.

¹⁸ *Relief Fire Ins. Co. v. Shaw*, 94 U. S. 574, 577, 24 L. Ed. 291.

¹⁹ *Sanborn v. Insurance Co.*, 16 Gray (Mass.) 448, 77 Am. Dec. 419; *Trustees of First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305; *Security Fire Ins. Co. v. Kentucky Marine & Fire Ins. Co.*, 7 Bush (Ky.) 81, 3 Am. Rep. 301.

In *Henning v. Insurance Co.*, 47 Mo. 425, 4 Am. Rep. 332, such a provision was held to be restrictive, and an oral policy therefore to be void.

²⁰ There seems to be no sufficient reason why these rules of law should

three classes. The first and least important of these embraces those cases in which the expectant insured contracts with an insurance broker for insurance in whatsoever company the broker may elect, and for the continuance of such insurance, or that the broker shall keep certain property insured. Here the broker is purely the agent of the insured, and the contract between them is simply one of agency, to be governed by the rules of law ordinarily applying to such contracts. If the broker fails to perform his agreement and secure valid insurance, he is liable for his breach of contract, the measure of damages being the sum for which the broker was instructed to procure insurance, provided the insurance in such sum could have been secured by the exercise of reasonable diligence on the part of the broker.²¹ Such contracts, however, cannot be properly called insurance contracts.

Preliminary Oral Contracts.

The most frequently occurring and most important kinds of oral insurance contracts are those preliminary to the execution of formal policies. As has been seen, there is no reason in the law why final contracts of present insurance should not be made by parol, but such unwritten contracts would be so inexpedient that they are seldom encountered. But the exigencies of business render preliminary oral contracts highly expedient. It is frequently of the highest importance that persons engaged in commercial ventures shall be able to secure immediate protection against possible loss; and, to use the language of Justice Bradley in *Eames v. Home Ins. Co.*:²² "If parties could not be made secure until all the formal documents were executed and delivered, especially where the insuring company is situated in a different state, the beneficial effect of this benign contract of insurance would often be defeated and rendered unavailable. As said by Mr. Justice Field in the case of *Franklin Fire Ins. Co. v. Colt*,²³ 'It would be impracticable [for a company] to carry on its business in other cities and states, or at least the business would be attended with great embarrassment and inconvenience, if such preliminary arrangements required for their validity and efficacy the for-

not be equally applicable to mutual benefit insurance organizations. It is true that such organizations are usually more narrowly restricted in the exercise of their powers, but this rule of construction should not be pushed to such an extreme as partially to defeat the object of the organization by declaring its preliminary oral contracts void. See *Bac. Ben. Soc.* § 172.

²¹ *Mallery v. Frye*, 31 Wash. Law Rep. (D. C.) 63; *Lindsay v. Pettigrew*, 5 S. D. 500, 59 N. W. 726; *Morton v. Hart*, 88 Tenn. 427, 12 S. W. 1026.

If the broker was acting under specific instructions, of course the measure of damages for his failure to perform is merely the sum which would have been received under the policy he had been instructed to procure. See *Sawyer v. Mayhew*, 51 Me. 398; *Alsop v. Colt*, 12 Mass. 40.

²² 94 U. S. 621, 627, 24 L. Ed. 298.

²³ 20 Wall. (U. S.) 567, 22 L. Ed. 423.

malities essential to the executed contract. The law,' he continues, 'distinguishes between the preliminary contract to make insurance or issue a policy, and the executed contract or policy. And we are not aware that in any case, either by usage or the by-law of any company, or by any judicial decision, it has ever been held essential to the validity of these initial contracts that they should be attested by the officers and by the seal of the company. Any usage or decision to that effect would break up or greatly impair the business of insurance as transacted by agents of insurance companies.'

Again, these preliminary contracts are of two kinds, which, while distinct in purpose and in rights acquired by the parties, are yet so similar in ultimate effect as to be often confused and seldom clearly distinguished. First, the insurer, by this preliminary contract, may either presently insure the subject-matter by parol or binding slip, the contract to be effective until the formal policy is issued or the risk rejected; or, secondly, he may make a contract to insure the subject-matter at some subsequent time, which may be definite or indefinite. Under such contract the insurer becomes obligated to execute a contract of actual insurance, in accordance with the terms agreed upon.

Preliminary Contracts of Present Insurance.

Preliminary informal contracts of present insurance are intended to afford protection to the insured pending the execution and delivery of a formal policy, and are completed either by mere word of mouth or by binding slip. The binding slip is merely a written memorandum in aid of the oral contract, containing a statement of the important terms of the agreement, but not intended as a formal repository of all the terms of the contract. The oral agreement, therefore, whether aided by the binding slip or not, contemplates the issue of a formal policy, and by implication includes all the terms of that policy. Therefore, the rights and liabilities of the parties to these informal preliminary contracts are to be determined by the conditions of the policy expected, even though that policy may never issue.

Thus, in the leading case of *Lipman v. Niagara Fire Ins. Co.*,²⁴ a preliminary contract of insurance, evidenced by a binding slip, was made upon certain property which was described in the slip. Upon examination, the officers of the company determined to reject the risk, and two and a half hours before the property was burned gave notice to the agents of the insured that the insurance was terminated. A

²⁴ *LIPMAN v. NIAGARA FIRE INS. CO.*, 121 N. Y. 454, 24 N. E. 699, 8 L. R. A. 719, Richards, Ins. Cas. 301, Woodruff, Ins. Cas. 100. See, to the same effect, *Underwood v. Insurance Co.*, 161 N. Y. 413, 55 N. E. 936; *HICKS v. ASSURANCE CO.*, 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424; *Eames v. Insurance Co.*, 94 U. S. 621, 629, 24 L. Ed. 298; *Newark Mach. Co. v. Kenton Ins. Co.* (1893) 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768.

term of the policy expected to issue gave to the insurer a right to terminate the contract upon notice given. The insured contended that the contract was final, and could not be so discharged, but the court said: "We think there can be no doubt that the true construction of the binding slip only obligated the defendant according to the terms of the policy in ordinary use by the company. There is no other reasonable interpretation of the transaction. The binding slip was a short method of issuing a temporary policy for the convenience of all parties, to continue until the execution of the formal one. It would be unreasonable to suppose either that the broker expected an insurance except upon the usual terms imposed by the company, or that the secretary of the company intended to insure upon any other terms. The right of an insurance company to terminate a risk is an important one. It is not reserved in terms in the binding slip, and could not be exercised at all so long as no policy should be issued, unless the condition in the policy is deemed to be incorporated therein. Upon the plaintiff's contention the company could not cancel the risk so long as the binding slip was in force, and the only remedy of the company to get rid of the risk would be to issue the policy and then immediately cancel it. The binding slip was a mere memorandum to identify the parties to the contract, the subject-matter, and the principal terms. It refers to the policy to be issued. The construction is, we think, the same as though it had expressed that the present insurance was under the terms of the usual policy of the company to be thereafter delivered."

Where a standard policy has been prescribed by law, an oral contract is valid, but is conclusively subject to all the terms of the standard policy. Accordingly it has been held in a recent important decision by the Court of Appeals of New York that the rights of the insured under a preliminary oral contract were defeated by his failure to furnish proofs of loss as required by the standard policy, which had never been issued, and which the insurer, denying the existence of the oral contract, had declined to issue.²⁵

Preliminary Executory Contracts of Insurance.

Instead of making a contract of present insurance, the parties may make an agreement by which the insurer binds himself, subject to specified conditions, to issue a policy of insurance to the insured. A cer-

²⁵ *HICKS v. ASSURANCE CO.*, 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424.

It is difficult to accept the reasoning of the majority of the court in this case. As is clearly shown in the dissenting opinion of Werner, J., the company, through its agent, repudiated the contract, and declined to furnish forms for proof of loss. It is a well-settled rule of contract law that one party may not himself repudiate the obligation of a contract and still hold the other to performance. Upon such repudiation the aggrieved party should be allowed to consider the contract discharged, and sue for the breach. *Clark*,

tain time for its issue may be designated, but, if there is no such time agreed upon, the policy is to be delivered within a reasonable time. Under such an executory contract the right acquired by the insured is merely to demand the delivery of a policy in accordance with the terms agreed upon, and the obligation assumed by the insurer is to deliver such policy. The policy to be delivered is, of course, that in the contemplation of the parties at the time of making the preliminary contract—that is, the usual policy issued by that insurer, or the standard policy in case such a form has been prescribed by law. A failure on the part of the insurer to deliver the policy in accordance with the agreement at the time stipulated, or within a reasonable time, will render him liable in an action for breach of contract,²⁶ or to a suit in equity for specific performance. In case the property to be insured is destroyed before the issue of the policy, the measure of damages in an action for breach of contract to insure will be the same as if it had been brought upon the contract of insurance that should have issued.²⁷ Nor can the defendant in such case require of the plaintiff a performance of all the conditions of the policy contemplated. Having himself wrongfully failed to make the written contract, he cannot now claim that the plaintiff is bound by its terms. Hence the plaintiff may recover without having furnished proofs of loss or having complied with other requirements of the contemplated policy.²⁸ So, when suit is brought in equity for specific performance, if the loss to be insured against has already occurred, the court will do complete justice between the parties by rendering a decree for the amount recoverable under the policy when issued.²⁹

Another important consequence of the distinction between contracts of present insurance and executory contracts for future insurance is found in the application of the statute of frauds. As has been before stated,

Contr. 645; *Knickerbocker Life Ins. Co. v. Pendleton*, 112 U. S. 696, 5 Sup. Ct. 314, 28 L. Ed. 866; *Stokes v. Mackay*, 147 N. Y. 223, 41 N. E. 496.

²⁶ *Sanford v. Insurance Co.*, 174 Mass. 416, 54 N. E. 884, 75 Am. St. Rep. 358; *CAMPBELL v. INSURANCE CO.*, 73 Wis. 100, 40 N. W. 661, Woodruff, Ins. Cas. p. 76; *Klein v. Insurance Co. (Ky.)* 57 S. W. 250; *Preferred Acc. Ins. Co. v. Stone*, 61 Kan. 48, 58 Pac. 988.

²⁷ *Klein v. Insurance Co. (Ky.)* 57 S. W. 250; *HICKS v. ASSURANCE CO.*, 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424; *CAMPBELL v. INSURANCE CO.*, 73 Wis. 100, 40 N. W. 661, Woodruff, Ins. Cas. 76.

²⁸ See cases cited in note 25, especially dissenting opinion of Landon, J., in *HICKS v. ASSURANCE CO.*, supra; *Taylor v. Insurance Co.*, 9 How. (U. S.) 390, 13 L. Ed. 187; *Post v. Insurance Co.*, 43 Barb. (N. Y.) 351; *New England Fire & Marine Ins. Co. v. Robinson*, 25 Ind. 536; *Western Assur. Co. v. McAlpin*, 23 Ind. App. 220, 55 N. E. 119, 77 Am. St. Rep. 423.

²⁹ *Woody v. Insurance Co.*, 31 Grat. (Va.) 362, 31 Am. Rep. 733; *Phoenix Ins. Co. v. Ryland*, 69 Md. 437, 16 Atl. 109, 1 L. R. A. 548; *Commercial Mut. Ins. Co. v. Union Mut. Ins. Co.*, 19 How. (U. S.) 318, 15 L. Ed. 636; *Western Assur. Co. v. McAlpin*, 23 Ind. App. 220, 55 N. E. 119, 77 Am. St. Rep. 423.

a contract of present insurance is valid without writing, though for a period exceeding one year, but a parol agreement to make a contract of insurance at a future date more than a year distant is unenforceable. Thus, in a recent case in Kentucky, it was held that an oral agreement on the part of an insurer to issue a policy on certain property on a specified date each year until further directed was not enforceable because it could not be performed within a year.³⁰

WHEN AN ORAL CONTRACT BECOMES COMPLETE.

60. The existence of a binding oral contract, being a question of fact, is for the determination of a jury; but these requisites must be present:

- (a) The agent of the insurer, if a corporation, must have authority to contract orally.
- (b) All the essential terms of the contract must either expressly or impliedly be determined by the parties, or the means of fixing such terms agreed upon.

Having thus found that a contract of insurance is valid though merely oral, it next becomes necessary to determine when such oral contract will be deemed to be complete. In order to the creation of such a contract, a meeting of the minds of the parties is necessary; but whether such a meeting has taken place is a question of fact necessarily left to a jury under proper instructions from the court. But in making proper application of the findings of fact certain requisites for the existence of a binding contract must be considered. In the first place, it must be noted that the insurer cannot be bound upon an oral contract unless the agent through whom it is made is authorized to contract by parol.³¹ As a general rule, an agent who has authority to fix terms of insurance and to issue policies on behalf of his company has also authority to make preliminary oral contracts,³² even though the charter of the insurer, or a public statute, may direct that its contracts shall be made in writing, and signed by certain designated officers.³³

³⁰ *Klein v. Insurance Co.*, 57 S. W. 250. The correctness of this decision is doubtful. The agreement for the issue of yearly policies was terminable by the insured upon notice. It might, therefore, easily have been wholly performed within the year.

³¹ A bill for specific performance of a parol contract to insure must show on its face that the person making the contract on behalf of an insurer had authority so to bind it. *Haskin v. Insurance Co.*, 78 Va. 700; *Haden v. Association*, 80 Va. 683.

³² *Baker v. Assurance Co.*, 162 Mass. 358, 38 N. E. 1124.

³³ *Baker v. Assurance Co.*, 162 Mass. 358, 38 N. E. 1124; *Sanborn v. Insurance Co.*, 16 Gray (Mass.) 448, 77 Am. Dec. 419; *Security Fire Ins. Co. v. Kentucky Marine & Fire Ins. Co.*, 7 Bush (Ky.) 81, 3 Am. Rep. 301; *Relief*

Again, no insurance agreement can be held a complete contract unless the parties have reached an agreement upon all the essential terms of the contract, such as the exact subject of the insurance, the rate of premium, the extent of the insurance, both as to time and as to risks assumed, and as to the amount of insurance underwritten, and any other terms that may in any given case be essential. There must remain nothing to be done by the insurer save the formal execution and delivery of the policy, and nothing by the insured save the acceptance of the policy and the payment of the premium stipulated.³⁴ Where some essential term of the contract remains unsettled at the time of the loss, the insurer cannot be considered as bound;³⁵ as when the length of the term, or the rate of premium,³⁶ has not been agreed upon, or where the property to be covered by the insurance has not been clearly designated.³⁷ So, if any condition precedent to the making of the contract remains unfulfilled, it cannot be deemed binding; as where an agent agrees with the insured upon certain terms, subject to the approval of a superior agent.³⁸ But the mere fact that a parol contract is made subject to the revision and possible rejection of higher officers of the insurer does not prevent it from being binding until rejected.³⁹ The right of rejection is rather a condition subsequent, that may operate to determine the rights of the insured under the contract, than a condition precedent to the binding effect of the contract. Nor, it seems, does a failure to specify a date at which the insurance is to take effect prevent the contract from being operative, as the risk will be considered to commence immediately.⁴⁰

It is not necessary that these essential terms of the contract shall be definitely determined; it is sufficient if they are made determinable.⁴¹

Fire Ins. Co. v. Shaw, 94 U. S. 574, 24 L. Ed. 291. As to power of subagent, see *Insurance Co. of North America v. Thornton*, 130 Ala. 222, 30 South. 614, 55 L. R. A. 547, 89 Am. St. Rep. 30.

³⁴ See *Trustees of First Baptist Church v. Brooklyn Fire Ins. Co.*, 28 N. Y. 153; *Home Ins. Co. v. Adler*, 77 Ala. 242; *Western Assur. Co. v. McAlpin*, 23 Ind. App. 220, 55 N. E. 119, 77 Am. St. Rep. 423; *Johnson v. Insurance Co.*, 84 Ky. 470, 2 S. W. 151.

³⁵ *Scammell v. Insurance Co.*, 164 Mass. 341, 41 N. E. 649, 49 Am. St. Rep. 462; *J. C. Smith & Wallace Co. v. Prussian Nat. Ins. Co.*, 68 N. J. Law, 674, 54 Atl. 458; *Piedmont & A. Ins. Co. v. Ewing*, 92 U. S. 377, 23 L. Ed. 610; *Hamilton v. Insurance Co.*, 5 Pa. 339.

³⁶ *Strohn v. Insurance Co.*, 37 Wis. 625, 19 Am. Rep. 777.

³⁷ *Kimball v. Insurance Co. (C. C.)* 17 Fed. 625.

³⁸ See *Haden v. Association*, 80 Va. 683; *Atkinson v. Insurance Co.*, 71 Iowa, 340, 32 N. W. 371.

³⁹ *Fidelity & Casualty Co. v. Ballard*, 105 Ky. 253, 48 S. W. 1074; *Putnam v. Insurance Co.*, 123 Mass. 324, 25 Am. Rep. 93. And see *Oliver v. Insurance Co.*, 97 Va. 134, 33 S. E. 536.

⁴⁰ *Potter v. Insurance Co. (C. C.)* 63 Fed. 382.

⁴¹ See *Orient Mut. Ins. Co. v. Wright*, 23 How. (U. S.) 401, 16 L. Ed. 524;

The parties may agree upon a method of fixing terms yet unsettled, and become at once bound by the contract. Thus, where all the terms of contract for insurance of a certain building were agreed upon save the premium rate, which was left to the determination of the agent after inspection, it was held that the insurer was bound and liable for the loss occurring before the rate of premium fixed by the agent had been communicated to the insured.⁴² So, some of the essential terms of the contract may, without express stipulation, be well understood by reason of a local usage or a previous course of dealing between the parties, and an apparently incomplete agreement thus become binding.⁴³

CONTRACTS IN WRITING.

61. **The contract of insurance is usually evidenced by writing. This writing may be informal, as a binding slip, or a written application informally accepted; or it may be formal, being the carefully drawn written policy in customary use, or, more rarely, the policy under seal.**

The completed contract of insurance is usually evidenced by a formal written instrument known as a "policy," which ordinarily is intended to contain and merge all previous negotiations, and serve as the only and final repository of the agreement of the parties. This policy was formerly frequently executed under corporate seal, but in modern times a policy under seal is of rare occurrence.

There are, however, informal writings made in evidence of the contract entered into, which fall halfway between the formal written policy and the oral contract.

Scammell v. Insurance Co., supra; *J. C. Smith & Wallace Co. v. Prussian Nat. Ins. Co.*, supra.

⁴² *Cooke v. Insurance Co.*, 7 Daly (N. Y.) 555; *Audubon v. Insurance Co.*, 27 N. Y. 216.

⁴³ *J. C. Smith & Wallace Co. v. Prussian Nat. Ins. Co.*, 68 N. J. Law, 674, 54 Atl. 458. In this case the court well sums up the law as follows: "To constitute a valid contract there should be parties thereto, a premium, a subject-matter, an insurable interest, certain risks or perils, duration of the risk, and the amount insured; but in the temporary oral contracts, or in those evidenced by binders, some of these terms are often omitted, and need not be expressly negotiated upon, since they may be understood—as where the terms of the usual policy are presumed to be intended, or where the usual rate of premium is presumed to be meant, or, in case of duration of the risk, is understood to be the same as in a former policy, or where by custom or usage a certain course of dealing has been established."

INFORMAL WRITTEN CONTRACTS.

62. **THE BINDING SLIP**—The binding slip is merely a written memorandum of the most important terms of a preliminary contract of insurance, intended to give temporary protection pending the investigation of the risk by the insurer, or until the issue of a formal policy. By intentment it is subject to all the conditions in the policy to be issued.
63. A written application for insurance, when finally and absolutely accepted by the insurer, becomes thereby the memorandum of a completed contract, which is binding until the issue of a policy. So, any written offer properly accepted by the insurer becomes a binding contract without the execution of a policy.

These informal writings are but incomplete and temporary contracts—memoranda given in aid of parol agreements. Such memoranda usually fix all the essential provisions that are variable, but they are not ordinarily intended to include all the terms of agreements, and always look to the formal policy that is expected subsequently to issue for a complete statement of the contract made. Hence, as heretofore stated, the contract evidenced by the binding slip is subject to all the conditions of the contemplated policy, even though it may never issue;⁴⁴ and the same is true of other informal written contracts. The memorandum may evidence a binding contract even where some essential term remains undetermined, provided the parties have agreed upon some method of thereafter fixing such term. This is well illustrated in a case⁴⁵ recently decided by the Supreme Court of Massachusetts, in which the memorandum relied upon as evidence of a contract was as follows: "About \$3,000 insurance is wanted by Scammell Bros., for account of whom, etc., loss, if any, payable to them or order for \$—— of chartered freight per Brig. 'Peeress' valued at \$—— amount of charter at and from Santa Fe to a port in the U. K. or on the Continent. Priv. of port of call for others. Premium, open for particulars. Binding." It was contended by the defendant insurer that the memorandum fell short of a complete contract, since the premium rate, one of the most essential terms of such agreements, had never been fixed. The court held, however, that the parties had made a binding agreement for temporary insurance, subject to the condition that the insured should, within a reasonable time, furnish the insurer particular information concerning the risk which would enable the insurer to fix a reasonable rate to be paid for the protection

⁴⁴ See *LIPMAN v. INSURANCE CO.*, 121 N. Y. 454, 24 N. E. 699, 8 L. R. A. 719, Richards, Ins. Cas. 301, Woodruff, Ins. Cas. 100.

⁴⁵ *Scammell v. Insurance Co.*, 164 Mass. 341, 41 N. E. 649, 49 Am. St. Rep. 462.

given. If the insured had given the particulars within a reasonable time, and paid the premium as then fixed by the insurer, the latter would have been bound. But since the insured failed, during some five months that intervened between the dates of the making of the memorandum and the loss of the vessel, to give the information he had by implication agreed to furnish, he was precluded, by his own default, from requiring performance on the part of the insurer.

Acceptance of Application.

Under the usual conditions attending the making of an insurance contract, a binding acceptance of the offer contained in the application is given only upon the delivery of a policy. But this is not necessarily the case. If the application is accepted, and the fact of acceptance made known to the insured, and no condition remains to be performed in order to entitle the insured to the policy to be executed, or to the benefit of the insurance, the contract is complete, and the insured may compel the insurer, even after loss, to issue a policy in accordance with the terms of the application.⁴⁶ Of course, however, an acceptance of the application does not complete the contract when such acceptance has not been communicated to the applicant,⁴⁷ nor when the application contains the condition that the contract shall not become operative until the delivery of the policy⁴⁸ or the payment of the first premium, or the performance of some other condition. Neither, in such cases, does the acceptance of the application and the tender of a policy to the applicant complete the contract when the applicant refuses to receive the policy.⁴⁹ In order that the insurer shall be bound, the application must be actually accepted. Mere delay in acting upon the application is not sufficient.⁵⁰ Neither will the payment of the first premium to the agent, pending the action of the insurer upon the application, complete the contract.⁵¹ Even though

⁴⁶ *Commercial Ins. Co. v. Hallock*, 27 N. J. Law, 645, 72 Am. Dec. 379; *McCulloch v. Insurance Co.*, 1 Pick. (Mass.) 278; *Lightbody v. Insurance Co.*, 23 Wend. (N. Y.) 18; *Walker v. Insurance Co.*, 56 Me. 371; *New York Life Ins. Co. v. Babcock*, 104 Ga. 67, 30 S. E. 273, 42 L. R. A. 88, 69 Am. St. Rep. 134.

⁴⁷ *Equitable Life Assur. Soc. v. McElroy*, 83 Fed. 631, 28 C. C. A. 365.

⁴⁸ *McCully's Adm'r v. Insurance Co.*, 18 W. Va. 782. And see *Jacobs v. Insurance Co.*, 71 Miss. 658, 15 South. 639; *Langstaff v. Insurance Co.* (1903) 69 N. J. Law, 54, 54 Atl. 518; *McClare v. Association*, 55 N. J. Law, 187, 26 Atl. 78.

⁴⁹ *Hogben v. Insurance Co.*, 69 Conn. 503, 38 Atl. 214, 61 Am. St. Rep. 53; *Schwartz v. Insurance Co.*, 18 Minn. 448 (Gil. 404).

⁵⁰ *Home Forum Ben. Order v. Jones*, 5 Okl. 598, 50 Pac. 165; *Walker v. Insurance Co.*, 51 Iowa, 679, 2 N. W. 583; *Winneshiek Ins. Co. v. Holzgrafe*, 53 Ill. 516, 5 Am. Rep. 64.

⁵¹ *Pickett v. Insurance Co.*, 39 Kan. 697, 18 Pac. 903; *Armstrong v. Insurance Co.*, 61 Iowa, 212, 16 N. W. 94; *Coker v. Insurance Co.* (Tex. Civ. App.) 81 S. W. 703.

the premium paid may still be in the hands of the agent of the insurer at the time the loss against which the insurance is proposed occurs, the insurer is not liable unless he has actually accepted the application.⁶² The principles applying to such cases have been well stated by the Georgia Court of Appeals in an excellent opinion by Lewis, J., from which the following paragraph may well be quoted:⁶³ "The fundamental question to be determined in the legal construction of all contracts is, what was the real intention of the parties? Where one party makes a proposition to purchase a thing which is unconditionally accepted by the other, the contract of purchase becomes complete. There is no reason why the same rule should not be applied when a written application is made for an insurance policy. So long as the application is not acted upon by the insurance company, of course no contract has been consummated, and, if the applicant should die before the acceptance of his application, the company has incurred no liability. But when the application is accepted, and nothing remains for the applicant to do, the contract becomes complete. Actual delivery of the policy to the insured is not essential to the validity of such a contract, unless expressly made so by its terms. It is true that whether or not a policy has been delivered often becomes a material question, for this is usually the most effective way of proving the acceptance of the application made by the insured. But the contract may be otherwise proved, and when it is shown to be in writing it is ordinarily binding upon the company, though there should be no delivery whatever, either actual or constructive, of the policy, and though it should remain in the hands of the company. This principle is settled by the provisions of our statute, which declares: 'Such contract [fire insurance], to be binding, must be in writing; but delivery is not necessary if, in other respects, the contract is consummated.' Civ. Code, § 2089."

Insurance by Correspondence.

Just as a valid contract of insurance may be made by parol, so it may be entered into by informal correspondence. The communications contain the offer and acceptance, thus making up the written contract. The same general rules apply to the consummation of such an informal written contract as have been previously discussed⁶⁴ with regard to oral contracts; that is, the contract will be deemed complete and binding when the offer made has been accepted in terms, and this

⁶² See cases cited in the two preceding notes; also, *Chamberlain v. Insurance Co.*, 109 Wis. 4, 85 N. W. 123, 83 Am. St. Rep. 851, modifying *Mathers v. Association*, 78 Wis. 588, 47 N. W. 1130, 11 L. R. A. 83.

⁶³ *New York Life Ins. Co. v. Babcock*, 104 Ga. 67, 30 S. E. 273, 42 L. R. A. 88, 69 Am. St. Rep. 134.

⁶⁴ *Supra*, § 60.

acceptance properly communicated, even though both parties contemplate the subsequent issue of a formal policy.

The rules governing acceptance by letter in general contract law apply fully to similar conditions in the law of insurance.⁶⁵ The contract is consummated by acceptance upon the mailing of the letter of acceptance properly stamped and addressed, and the insurer will be bound, even though the letter may never be received, or may be received only after the property insured has been destroyed.⁶⁶ But in an early Massachusetts case⁶⁷ it was held that the insurer was not bound until the receipt of the letter containing the acceptance of the insured. This, however, is clearly contrary to the great weight of authority.

It is immaterial what may be the form which the communications that are alleged to evidence the contract of insurance may assume, or how informal they may be. It is sufficient if these communications clearly show that the parties have come to an agreement upon the essential terms of the contract. Thus, in the leading case of *Eames v. Home Ins. Co.*,⁶⁸ a letter in which the plaintiff wrote, "6½% is pretty heavy, but I guess we will have to stand it, as I do not know where we can do better at present," was held to be a sufficient acceptance of the offer made by the defendant in a letter to which the one quoted from was the reply.

FORMAL WRITTEN CONTRACTS—THE POLICY.

64. When the contract of insurance is finally complete, it is customarily embodied in a formal written instrument, termed a "policy." This instrument merges all prior or contemporaneous parol agreements touching the transaction; and upon accepting it the insured is conclusively presumed, in the absence of fraud, to have given his assent to all of its terms.

As heretofore stated, a contract of insurance may validly be made by parol, but the elaborate character of the contract and the great number of conditions ordinarily contained in it render it exceedingly unwise for the parties to allow the important property rights involved to be subject to the uncertainty necessarily incident to all oral agreements. Hence has arisen a custom, as old as the practice of insur-

⁶⁵ *Clark, Contr.* (2d Ed.) pp. 25, 26.

⁶⁶ *Hartford Steam-Boller Inspection & Ins. Co. v. Lasher Stocking Co.*, 66 Vt. 439, 29 Atl. 629, 44 Am. St. Rep. 859; *Eames v. Insurance Co.*, 94 U. S. 621, 24 L. Ed. 298; *Schultz v. Insurance Co. (C. C.)* 77 Fed. 375; *Hamilton v. Insurance Co.*, 5 Pa. 339; *Tayloe v. Insurance Co.*, 9 How. (U. S.) 390, 13 L. Ed. 187.

⁶⁷ *McCulloch v. Insurance Co.*, 1 Pick. 273.

⁶⁸ 94 U. S. 621, 24 L. Ed. 298.

ance, and departed from only in cases of emergency, to commit the contract to writing. This formal writing is termed a "policy."

The history of the development of the insurance policy, undoubtedly one of the most important of commercial instruments, is full of interest. Probably no other instrument in frequent use has been drawn with so little skill and with such consistent disregard of settled rules of law. The courts have complained in vain,⁵⁹ and even grown caustic to no effect. "Courts of law," said a famous English judge,⁶⁰ "have always considered a policy of insurance as an absurd and incoherent instrument." But the merchant was wedded to his idol, and the marine policy remained for centuries unalterably incoherent, and only gradually was beaten into an intelligible shape, from a legal point of view, by the heavy blows dealt it in the course of the incessant litigation provoked by its cumbrous and uncertain terms. Even to this day marine insurers on both sides of the Atlantic make use of, as the repository of their insurances, the form of policy so severely censured by Justice Buller, only a few changes having been made by reason of English statutes or of changed conditions. Of course, however, the numerous decisions construing its terms have rendered practically certain the meaning of this remarkable instrument, and probably justify insurers in enduring the ills they have in its cumbrous form rather than in flying to those they know not of in some newly adopted form.

Neither are the modern fire and life policies free from the objections thus made to the ancient marine policy. Drawn up with the double purpose of attracting parties to be insured and of limiting the liability of the insurer as narrowly as possible, these instruments are full of crudities, inconsistencies, and ambiguities, which have been slowly pared away by the courts in the course of litigation which would have been greatly reduced in volume if the policies had been fairly and skillfully drawn.

These same evil characteristics of which the courts complain—complexity and unintelligibility—have also wrought some curious results in regard to the practice of persons insured. It seldom happens that an ordinarily prudent man enters into a written contract without first assuring himself as to its terms by a careful perusal. Yet such is not the case with insurance policies. It is the exceptional man who reads the policy delivered to him, although the legal consequence of his acceptance of the instrument is to raise a conclusive presumption that he knows and consents to all of its terms, and to preclude him from

⁵⁹ See *Yeaton v. Fry*, 5 Cranch (U. S.) 342, 3 L. Ed. 117, per Marshall, C. J.; *Maryland Ins. Co. v. Woods*, 6 Cranch (U. S.) 29 (at page 45 et seq.), 3 L. Ed. 143; *American Ins. Co. v. Stoy*, 41 Mich. 385, 1 N. W. 877.

⁶⁰ Buller, J., in *Brough v. Whitmore*, 4 Term R. 206. In the same case Lord Kenyon said that only the uniform practice of merchants and underwriters had rendered policies of insurance intelligible.

showing by parol any terms of the agreement not set forth in the policy, or in any wise contradicting or varying the writing which he, by his act of acceptance, makes the sole repository of his contract. Such carelessness on the part of persons insured is explained, and to some extent excused, by the fact that on account of the complex character of the instrument the untrained layman was little wiser after reading than before. From the bad forms of insurance policies and the consequent failure of parties insured to understand their rights and liabilities under them, flow most of the difficulties, and the larger part of the litigation in this branch of the law.

Standard Forms.

An early writer on insurance says: "The common course appears to be the better one, namely, to leave parties to make such stipulations and in such terms as they may choose."⁶¹ The principle so stated is correct when applied to strictly private contracts. But the contract of insurance contains a quasi public element. The public interest in having responsible insurers and certain and fair contracts imposes some limitation upon the individual's right to contract as he may choose.⁶² Further, insurance is primarily a contract of the law merchant, and therefore powerfully affected by the custom of merchants. Custom tends necessarily to uniformity; and just as the custom of merchants prescribed certain terms for all instruments that were to possess the quality of negotiability, so the custom of underwriters gradually fixed the terms of insurance contracts, and wrought powerfully to establish a standard form for the expression of these terms. The ultimate result of the operation of these influences has been the adoption by legislative enactment, as heretofore explained,⁶³ of standard forms for fire policies in many of the states of the American Union, and of a standard marine policy in England. In the other branches of insurance there is still no limit to the number of forms in which policies may be written save the desires of the insured and the ingenuity of the insurers.

Execution of the Policy.

A policy of insurance may be validly executed with or without a seal. Policies under seal, however, are few, and executed only by such ancient corporations as began to insure during the time when it was assumed that corporations could contract only by seal.⁶⁴ In the case

⁶¹ 1 Marsh. Ins. (Ed. 1810).

⁶² *Daggs v. Insurance Co.*, 136 Mo. 382, 38 S. W. 86, 35 L. R. A. 227, 58 Am. St. Rep. 638; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552. See *supra*, p. 76.

⁶³ See *ante*, p. 29. The construction of the Standard fire policy is fully considered in chapters 12 and 13.

⁶⁴ *Clark, Corp.* 156 et seq.; *Bank of Columbia v. Patterson*, 7 Cranch (U. S.)

of corporate insurers, policies are necessarily executed by agents. In the absence of limitation brought to the notice of third parties, any officer or agent of a corporate insurer who is authorized to contract on its behalf is capable of executing its written policies. In practice, however, it is usual that these instruments shall bear the signatures of high executive officers, as of the president or secretary.

But such a mode of execution may be prescribed as will constitute a limitation upon the apparent powers of the agent. There may be a requirement that the policy shall be signed by one agent and countersigned by another as a condition precedent to its validity. The effect of executing a policy without complying with such requirements depends largely upon the source of the requirements. (1) If found in the charter of the corporation, the limitation is presumed to be known to the public; and while an oral contract may be valid, yet a written policy will be invalid unless executed in the mode prescribed.⁶⁵ (2) If found in the by-laws of the corporation, with knowledge of which the public is not charged,⁶⁶ the limitation restricts the apparent powers of agents only when actually known to the insured.⁶⁷ (3) When the policy itself prescribes a mode of execution, the insured has notice of the limitation thereby imposed upon the powers of the insurer's agents, and, in the absence of circumstances estopping the insurer, cannot claim that a policy not executed in the manner prescribed is valid⁶⁸ unless an agent, authorized under the policy to make the policy effective in one way, adopts another with clear contractual intent; for such

299, 3 L. Ed. 351; *Mitchell v. Insurance Co.*, 45 Me. 104, 71 Am. Dec. 529. In many states there are statutes providing that insurance contracts need not be under seal. These are merely declaratory of the law as it now exists. In *Lindauer v. Insurance Co.*, 13 Ark. 461, it seems that it is held that where the charter provides that policies issued by the company shall be under seal the company cannot, in a suit to recover the premium, introduce in evidence an unsealed policy.

⁶⁵ *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345, 15 Am. Rep. 612; *Head v. Insurance Co.*, 2 Cranch (U. S.) 127-169, 2 L. Ed. 229, holding that a contract to cancel a policy is as much an instrument as the policy itself, and can only be executed in the manner prescribed by the charter of the company. See, also, *Couch v. Insurance Co.*, 38 Conn. 181, 9 Am. Rep. 375, holding that a waiver of a provision in a policy executed in any manner save that required by its charter is invalid.

⁶⁶ *Clark, Corp.* 460.

⁶⁷ See *infra*, chapter 9. That members of mutual associations are bound by the by-laws and regulations, see *Mutual Assur. Soc. v. Korn*, 7 Cranch (U. S.) 396 (at page 399), 3 L. Ed. 383; *Clark v. Association*, 14 App. D. C. 154, 43 L. R. A. 390; *Sulz v. Association*, 145 N. Y. 563, 40 N. E. 242, 28 L. R. A. 379; *Nickels v. Association*, 93 Va. 380, 25 S. E. 8; *Supreme Commandery K. G. R. v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332.

⁶⁸ *Globe Acc. Ins. Co. v. Reid*, 19 Ind. App. 203, 47 N. E. 947; *Lynn v. Burgoyne*, 13 B. Mon. (Ky.) 400; *Badger v. Insurance Co.*, 103 Mass. 244, 4 Am. Rep. 547.

agent, being authorized to make the contract, may waive that provision of the policy requiring a particular mode of executing it.⁶⁹ So, where a policy which provides that it shall not become operative until countersigned by a designated agent is delivered as a contract by that agent without being countersigned, the insurer will be estopped to claim that the contract is not binding.⁷⁰ It seems, however, that when the insured is the agent whose countersignature is required for the completion of the contract, an uncountersigned policy in the possession of the agent is not enforceable against the insurer.⁷¹

The mode of execution of the Lloyd's marine policy in England is peculiar. Instead of being subscribed by the society which is incorporated, or by any agent in its behalf, it is underwritten by individual insurers, members of the society. Each underwriter concerned subscribes his initials, with the amount of the risk assumed by him set opposite, and is individually liable to the amount of his subscription.

The insurance policy does not ordinarily receive the signature of the party insured, who, however, is fully bound by all the terms of the contract upon his acceptance of the policy, whether he actually knows what they are or not.⁷² In some instances, however, mutual benefit societies require their benefit certificates to be signed by the insured before giving them legal effect.⁷³

WHEN THE POLICY BECOMES BINDING.

65. The policy becomes binding as a contract only when delivered and all conditions precedent have been satisfied.

The reader must keep in mind that the question as to the validity of a policy of insurance upon which an action is brought is very different from the question whether a binding contract of insurance has been made in any given case. As has been heretofore shown, a binding contract of insurance or to insure can be, and often is, made wholly by parol, and without delivery of any policy whatsoever, even though the parties may have contemplated the execution and delivery of a policy. But in such cases the action is upon the parol agreement, and not on the policy which the insurer had failed to deliver.⁷⁴

⁶⁹ *Myers v. Insurance Co.*, 27 Pa. 268, 67 Am. Dec. 462.

⁷⁰ *Myers v. Insurance Co.*, 27 Pa. 268, 67 Am. Dec. 462; *Hibernia Ins. Co. v. O'Connor*, 29 Mich. 241.

⁷¹ *Badger v. Insurance Co.*, 103 Mass. 244, 4 Am. Rep. 547. But see *Norton v. Insurance Co.*, 36 Conn. 503, 4 Am. Rep. 98, contra, by a divided court.

⁷² *NEW YORK LIFE INS. CO. v. FLETCHER*, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934; *Richardson v. Insurance Co.*, 46 Me. 394, 74 Am. Dec. 459.

⁷³ *Somers v. Protective Union*, 42 Kan. 619, 22 Pac. 702.

⁷⁴ *HICKS v. ASSURANCE CO.*, 162 N. Y. 284, 56 N. E. 743, 48 L. R. A.

When the validity of a policy is put in issue, the question is not whether some contract has been made, but whether the parties have agreed upon this particular writing as the repository of the terms of their contract. No written instrument is binding upon the parties until it is either signed by both of the parties, or, if signed by one, delivered by him and accepted by the other; or it may be accepted by both parties without signing. Or, as the rule is ordinarily stated, delivery is necessary to the validity of a written instrument. It is plain, however, that the real meaning of the rule is that parties cannot be bound upon a contract, whether written or unwritten, unless they have both consented to be bound; and that any satisfactory evidence of this consent in the case of contracts in writing will constitute a "delivery."⁷⁵

With reference to what constitutes such a delivery as will put into effect a written agreement, we must note a distinction that exists between sealed and unsealed instruments. A specialty is a solemnly executed agreement into which parties are not supposed lightly to enter. Hence the law requires more formal evidence of the intention to be bound under a specialty than in the case of a simple writing; and a delivery of a specialty, being recognized as the last solemn act requisite to its becoming effective, will not be so readily inferred from equivocal conduct.⁷⁶ Therefore, as we shall presently see, the cases do not require such clear proof of delivery of an insurance policy as of a deed.

Having thus determined that delivery is a prerequisite to the validity of every policy, we have next to note that the parties may further impose such additional conditions precedent to its validity as a contract as they see fit; such as, for example, that the first premium shall be paid.⁷⁷ These conditions may be set forth (1) in the instrument itself,

424; *Ruggles v. Insurance Co.*, 114 N. Y. 415, 21 N. E. 1000, 11 Am. St. Rep. 674; *Van Loan v. Association*, 90 N. Y. 281; *Angell v. Insurance Co.*, 59 N. Y. 171, 17 Am. Rep. 322; *Commercial Mut. Marine Ins. Co. v. Union Mut. Ins. Co.*, 19 How. (U. S.) 321, 15 L. Ed. 636; *Franklin Fire Ins. Co. v. Colt*, 20 Wall. (U. S.) 567, 22 L. Ed. 423; *Security Fire Ins. Co. of New York v. Kentucky Marine & Fire Ins. Co.*, 7 Bush (Ky.) 81, 3 Am. Rep. 301; *Western Assur. Co. v. McAlpin*, 23 Ind. App. 220, 55 N. E. 119, 77 Am. St. Rep. 423.

⁷⁵ *New York Life Ins. Co. v. Babcock*, 104 Ga. 67, 30 S. E. 273, 42 L. R. A. 88, 69 Am. St. Rep. 134, and note, 143-153; *Xenos v. Wickham*, L. R. 2 Eng. & Irish App. Cas. 296; *Newark Mach. Co. v. Kenton Ins. Co.*, 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768.

If an officer of the company indorses an acceptance upon the application of the insured, and fills out the policy with intent to have it take immediate effect, and causes it to be mailed to the applicant as of force and effect at that time, the company cannot successfully claim that there was no delivery, although the policy did not reach its destination until after the death of the applicant. *Dailey v. Association*, 102 Mich. 289, 57 N. W. 184, 26 L. R. A. 171; same case on rehearing, 102 Mich. 299, 60 N. W. 694, 26 L. R. A. 171.

⁷⁶ See *Xenos v. Wickham*, L. R. 2 Eng. & Irish App. Cas. 296.

⁷⁷ *Infra*, § 67.

when they may be inoperative because waived by a competent agent, or because a binding preliminary contract may have been made by parol, irrespective of such conditions; or (2) such conditions may have been agreed upon outside of the policy, as in the application, in which case they preclude the existence of any valid contract whatever, whether oral or written, until such conditions have been performed or authoritatively waived.⁷⁸

The usual conditions to be found in the applications for insurance are that the contract shall not become binding until the policy is delivered and the first premium paid. These conditions are valid and enforceable,⁷⁹ and are of such importance as to require discussion in detail.

DELIVERY.

66. Any acts or words clearly showing an intention on the part of the insurer to be bound by a fully executed policy will constitute a sufficient delivery of the policy. Actual possession of the policy is evidential only, not essential.

A policy may be delivered subject to conditions, which may be shown by parol.

In General.

Delivery is largely a question of intention, as evidenced by words or acts. The requisites of a valid delivery may be said to be three: (1) There must be an intention on the part of the person executing the policy to give it legal effect as a completed instrument; (2) this intention must be evidenced by some word or act indicating that the insurer has put the instrument beyond his legal control, though not necessarily beyond his physical control; and (3) the insured must acquiesce in this intention.⁸⁰

⁷⁸ Since the law does not favor forfeitures, stipulations with reference to an insurance contract will not be considered conditions precedent unless it be clear that they were so intended by the parties. See *Hartford Steam Boiler Inspection & Ins. Co. v. Lasher Stocking Co.*, 66 Vt. 439, 29 Atl. 629, 44 Am. St. Rep. 859; *Aetna Ins. Co. v. Webster*, 6 Wall. (U. S.) 129, 18 L. Ed. 888.

⁷⁹ *Oliver v. Insurance Co.*, 97 Va. 134, 33 S. E. 536; *Misselhorn v. Association (C. C.)* 30 Fed. 545; *Union Cent. Life Ins. Co. v. Pauly*, 8 Ind. App. 85, 35 N. E. 190; *McCully's Adm'r v. Insurance Co.*, 18 W. Va. 782.

⁸⁰ *New York Life Ins. Co. v. Babcock*, 104 Ga. 67, 30 S. E. 273, 42 L. R. A. 88, 69 Am. St. Rep. 134, and note; *Xenos v. Wickham*, L. R. 2 Eng. & Irish App. Cas. 296; *Newark Mach. Co. v. Kenton Ins. Co.*, 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768; *St. Louis Mut. Life Ins. Co. v. Kennedy*, 6 Bush (Ky.) 450; *McCully's Adm'r v. Insurance Co.*, 18 W. Va. 782; *Heiman v. Insurance Co.*, 17 Minn. 153 (Gil. 127), 10 Am. Rep. 154; *Folb v. Insurance Co.*, 109 N. C. 568, 13 S. E. 798. Actual manual delivery is not essential. *Home Ins. Co. v. Curtis*, 32 Mich. 402. For example, where it is expressly

Intention—Fraudulently Procured Delivery.

A delivery procured by the fraud of the insured is of no effect in validating the policy.⁸¹ Thus, in *New York Life Ins. Co. v. Babcock*,⁸² where a third party induced the agent of the insurer to surrender a policy by concealing the death of the insured, the court considered the case as if the policy had never left the hands of the insurer's agent. But the delivery of a policy procured by the insured without disclosing the fact that a loss has already occurred is not fraudulent if the contract was complete, and the insured entitled to a policy, before loss.⁸³

Same—Conditional Delivery.

A policy may be delivered upon condition. In such cases the policy is of no binding effect until the condition is fulfilled.⁸⁴ Such conditions may be shown by parol without violating the well-known rule prohibiting the varying of written agreements by parol testimony. The condition so shown goes to the existence of the policy, and not to its terms. An interesting case illustrating this principle has recently

stipulated that the policy, when filled up, shall be held by the agent in his safe for the assured, no actual transfer to the assured is necessary. *Franklin Fire Ins. Co. v. Colt*, 87 U. S. 560, 22 L. Ed. 423. See *infra*, p. 172, note 90. Proof of intent to cause the policy to become effective must be strong. *Union Cent. Life Ins. Co. v. Pauly*, 8 Ind. App. 85, 35 N. E. 190; *Cronkhite v. Insurance Co. (C. C.)* 35 Fed. 26.

⁸¹ *Merchants' Mut. Ins. Co. v. Lyman*, 15 Wall. (U. S.) 664, 21 L. Ed. 246. In this case it was shown that the party procuring the insurance knew when the policy was issued that the vessel was lost, and it was held there could be no recovery. In *Piedmont & A. Ins. Co. v. Ewing*, 92 U. S. 377, 23 L. Ed. 610, while negotiations were still pending between agent and applicant, a friend paid the premium and secured the policy, concealing from the agent the fact that the insured was in extremis, and it was held that the delivery thus obtained by fraud was inoperative.

⁸² 104 Ga. 67, 30 S. E. 273, 42 L. R. A. 88, 69 Am. St. Rep. 134.

As to delivery by mistake, see *Hartford Fire Ins. Co. v. Wilson*, 187 U. S. 467, 23 Sup. Ct. 189, 47 L. Ed. 261.

⁸³ *Cory v. Patton*, L. R. 9 Q. B. 577; *Michigan Pipe Co. v. Michigan Fire & Marine Ins. Co.*, 92 Mich. 482, 52 N. W. 1070, 20 L. R. A. 277; *Mutual Life Ins. Co. v. Thomson*, 94 Ky. 253, 22 S. W. 87; *Commercial Ins. Co. v. Hallock*, 27 N. J. Law (3 Dutch.) 645, 72 Am. Dec. 379; *Kelm v. Insurance Co.*, 42 Mo. 38, 97 Am. Dec. 291; *Baldwin v. Insurance Co.*, 56 Mo. 151, 17 Am. Rep. 671. But see *Merchants' Mut. Ins. Co. v. Lyman*, 15 Wall. (U. S.) 664, 21 L. Ed. 246.

⁸⁴ *Hartford Fire Ins. Co. v. Wilson*, 187 U. S. 467, 23 Sup. Ct. 189, 47 L. Ed. 261; *Brown v. Insurance Co.*, 70 Iowa, 390, 30 N. W. 647; *Millville Mut. Marine & Fire Ins. Co. v. Collierd*, 38 N. J. Law, 480; *Harnickell v. Insurance Co.*, 111 N. Y. 390, 18 N. E. 632, 2 L. R. A. 150.

When prepayment is a condition precedent to the operation of the policy, the policy may be delivered to the agent of the applicant subject to such condition. *Helman v. Insurance Co.*, 17 Minn. 153 (Gil. 127), 10 Am. Rep. 154.

been decided in the Supreme Court of the United States.⁸⁵ The insurance company delivered certain policies to a broker on condition that they should not be considered binding, or surrendered to the insured, until the company might inspect the risk, and that, in case the risk should be rejected, the policies should be at once canceled. No premium was paid. The insurer inspected the risk, and notified the broker of its rejection. The broker, neglecting to return the policies to the insurer, inadvertently delivered them to the insured, who, upon destruction of the building insured, brought suit upon the policies. The lower court held that the insurer could not be allowed to show by parol such condition in order to escape liability, since each policy required all agreements and conditions upon which it was "made and accepted" to be indorsed on the policy. But the Supreme Court held that this reasoning applied only to the policies themselves after they should become legally executed instruments by virtue of an absolute delivery, and did not prevent the insurer from showing "that at the time of the fire there was no subsisting contract of indemnity between the company and the insured." The principle may be stated in brief thus: While a parol condition cannot be shown so as to affect the meaning of an existing written contract, yet a parol condition may always be shown to affect the existence of an alleged contract.⁸⁶

Harnickell v. New York Life Ins. Co.,⁸⁷ the authority chiefly relied upon in the *Wilson* Case, just discussed, presented precisely the same question with the parties reversed. In the *New York* case the insurer sought to recover on premium notes given for policies delivered subject to parol conditions, which failed. It was held, and with undoubted correctness, that these conditions could be shown by parol in order to establish the invalidity of the insurance and the consequent failure of consideration for the defendant's notes.

It is sometimes the case that a condition which by its terms appears to be a condition precedent imposed upon the delivery of the policy will be found, in view of all the facts of the case, to be a condition subsequent, rendering the contract defeasible in accordance with the terms of the condition. Thus, in *Ætna Ins. Co. v. Webster*,⁸⁸ the plaintiff received a duly executed policy of insurance, and shortly afterwards signed an application for the insurance just granted. In this application was a provision that the insurance granted upon this application was to take effect when approved by the general agent of the

⁸⁵ *Hartford Fire Ins. Co. v. Wilson*, 187 U. S. 467, 23 Sup. Ct. 189, 47 L. Ed. 261.

⁸⁶ *Burke v. Dulaney*, 153 U. S. 228, 14 Sup. Ct. 816, 38 L. Ed. 698; *Catt v. Olivier*, 98 Va. 580, 36 S. E. 980; *Donaldson v. Uhlfelder* (D. C.) 31 Wash. Law Rep. 428.

⁸⁷ 111 N. Y. 390, 18 N. E. 632, 2 L. R. A. 150.

⁸⁸ 6 Wall. (U. S.) 129, 18 L. Ed. 888.

defendant. The plaintiff heard nothing further of this condition until after the property insured was lost, when he was told that the insurance had not been approved by the general agent, and an offer was made to return to him his premium note. The court, considering the application as a part of the same transaction with the policy, held that the condition did not go to the delivery, but merely gave the insurer a right to terminate the contract upon the disapproval of the general agent, and notice before loss to the insured.⁸⁸

Evidence of Intention to Deliver.

Not only must there be an intention to deliver, but also there must be acts or words showing this intention. It is plain that manual tradition of the policy is not required for this purpose, for there may be a valid delivery without physical transfer,⁸⁹ and also there may be a

⁸⁸ See, on this general subject, *Perkins v. Insurance Co.*, 4 Cow. (N. Y.) 645; *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 152.

⁸⁹ Unless agreed upon by the parties as a condition precedent, actual delivery of policy is not necessary to its binding effect. *Xenos v. Wickham*, L. R. 2 H. L. Cas. 296; *Blanchard v. Waite*, 28 Me. (15 Shep.) 51, 48 Am. Dec. 474; *Bragdon v. Insurance Co.*, 42 Me. 259; *Michigan Pipe Co. v. Michigan Fire & Marine Ins. Co.*, 92 Mich. 482, 52 N. W. 1070, 20 L. R. A. 277; *City of Davenport v. Peoria Marine & Fire Ins. Co.*, 17 Iowa, 276; *Franklin Fire Ins. Co. v. Colt*, 20 Wall. (U. S.) 560, 22 L. Ed. 423. *Thompson v. Adams*, L. R. 23 Q. B. Div. 361, *Richards, Ins. Cas.* 295; *Newark Mach. Co. v. Kenton Ins. Co.*, 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768; *New York Life Ins. Co. v. Babcock*, 104 Ga. 67, 30 S. E. 273, 42 L. R. A. 88, 69 Am. St. Rep. 134.

Where agents of the company, under an agreement with the assured, hold the policy subject to the order and control of a third person, whose mortgage interest is covered by it, this is a sufficient delivery to give validity to the policy, though such third person does not call for or receive it. *Home Ins. Co. v. Curtis*, 32 Mich. 402. The courts of Massachusetts show a great reluctance to recognize the contract as complete until there has been actual manual transfer of the policy. In *MARKEY v. INSURANCE CO.*, 118 Mass. 178, a life policy was handed by the agent to the insured, who, after reading it, handed it over to the beneficiary with the remark, "There is your policy;" the beneficiary afterwards returning the policy to the agent, to enable him to present it to and get the premium from a third person. The agent retained the policy and a demand for the policy and a tender of the money the next day was refused, and it was held that there was no such delivery as would constitute a contract binding on the company. See, also, *Wainer v. Insurance Co.*, 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598, and cases cited therein. In the *Wainer Case*, plaintiff filed an application for insurance with defendant's agent, and, some time after receiving notice that his policy was ready, called for it, and paid the premium. There was no agreement that the policy should take effect before payment of the premium, and it was held that the time between the application and payment of the premium could not be considered in determining whether the premises were vacant for thirty days, contrary to a provision of the policy. But see *Wheeler v. Insurance Co.*, 131 Mass. 1.

When the application contains a provision that the policy shall not become

physical transfer without a delivery.⁹¹ Possession of the policy is evidential, but not conclusive. Possession by the insured raises a presumption of delivery,⁹² while possession by the insurer is prima facie evidence of no delivery.⁹³

A delivery is clearly intended when the policy is, without condition, put into the possession of the insured or his agent, or even of a third party for the benefit of the insured.⁹⁴ So, when the insurer properly mails a fully executed policy, addressed to the insured, the delivery is sufficient and the policy binding, even though it may be received by the insured after loss, or may never be received at all.⁹⁵

Same—Delivery to Agent of Insurer.

Whether a policy completely executed and put in the possession of the agent of the insurer to be delivered to the insured shall be deemed binding upon the insurer while still in the possession of the agent depends upon the nature of the agent's duty with reference to the policy. If the insured has done everything necessary to entitle him to possession of the policy, and there rests upon the agent the simple ministerial duty of transferring the policy to the insured, then the agent of the insurer in effect holds the policy for the insured, and it is binding on the parties without physical transfer.⁹⁶ If, however, the agent is

binding until it is actually delivered, it seems that a physical transfer is necessary. See *Misselhorn v. Association*, 30 Mo. App. 589.

⁹¹ For example, delivery procured by fraud or mistake is not such a delivery as will make the policy operative. *Supra*, p. 170. So, the policy may be delivered on condition. *Supra*, p. 170, and cases cited.

⁹² *Massachusetts Ben. Life Ass'n v. Sibley*, 158 Ill. 411, 42 N. E. 137. But such possession is only prima facie evidence of delivery—not conclusive. *Hartford Fire Ins. Co. v. Wilson*, 187 U. S. 467 (at page 478), 23 Sup. Ct. 189, 193, 47 L. Ed. 261.

Mere possession by the assured of a life policy which recites on its face that it is to take effect only when countersigned by A., and which is not so countersigned, is no evidence that the policy was ever delivered to the assured. *Prall v. Society*, 5 Daly (N. Y.) 298, affirmed 63 N. Y. 608.

⁹³ *Union Cent. Life Ins. Co. v. Pauly*, 8 Ind. App. 85, 35 N. E. 190; *Cronk-hite v. Insurance Co. (C. C.)* 35 Fed. 26.

⁹⁴ *Home Ins. Co. of Columbus v. Curtis*, 32 Mich. 402; *Clark, Cont.* (2d Ed.) 53.

⁹⁵ Mailing policy is sufficient delivery. *Hartford Steam-Boiler Inspection & Ins. Co. v. Lasher Stocking Co.*, 66 Vt. 439, 29 Atl. 629, 44 Am. St. Rep. 859; *Dailey v. Association*, 102 Mich. 289, 57 N. W. 184, 26 L. R. A. 171, *Elliot*, *Cas. Ins.* 23.

In *Yonge v. Society (C. C.)* 30 Fed. 902, the policy was mailed from the home office July 28th, and received by the local agent August 5th, but was never actually delivered into the possession of the applicant, who was taken ill August 6th, and died September 9th. Held that, as between the applicant and the company, the policy became effective and binding when placed in the mail July 28th, and, if not then, certainly when it reached the hands of the agent on August 5th.

⁹⁶ Delivery is complete when the agent of the insurer holds the policy

vested with some discretionary power in regard to the delivery, as where he is instructed not to deliver unless the insured is in good health,⁹⁷ or if the insured is not entitled to claim possession of the policy until some condition has been fulfilled, as the payment of the first premium,⁹⁸ in such cases the possession of the agent does not inure to the benefit of the insured, and there has been no sufficient delivery.⁹⁹ From the necessity of mutuality in all contracts it follows that the policy in the hands of the agent cannot be binding on the insurer unless it is also binding on the insured. If the insurer is liable in case of loss, the insured is liable to pay the stipulated premium.¹⁰⁰ Hence, when the insured has the right of rejecting the policy upon delivery, he cannot hold the insurer liable until actual delivery and acceptance of the policy.¹⁰¹

subject to the insured's unconditional right to demand surrender. *Franklin Fire Ins. Co. v. Colt*, 20 Wall. (U. S.) 560, 22 L. Ed. 423; *New York Life Ins. Co. v. Babcock*, 104 Ga. 67, 30 S. E. 273, 42 L. R. A. 88, 69 Am. St. Rep. 134; *Equitable Fire Ins. Co. v. Alexander* (Miss.) 12 South. 25; *Phoenix Ins. Co. v. Meier*, 28 Neb. 124, 44 N. W. 97; *Morrison v. Insurance Co.*, 64 N. H. 137, 7 Atl. 378; *Newark Mach. Co. v. Kenton Ins. Co.*, 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768; *Sheldon v. Insurance Co.*, 25 Conn. 207, 65 Am. Dec. 565; *Mutual Life Ins. Co. of New York v. Thomson*, 94 Ky. 253, 22 S. W. 87; *Home Ins. Co. of Columbus v. Curtis*, 32 Mich. 402. See, also, *Wheeler v. Insurance Co.*, 131 Mass. 1. *Dibble v. Assurance Co.*, 70 Mich. 1, 37 N. W. 704, 14 Am. St. Rep. 470, is an interesting case on this point. There an insurance agent, with general authority from the owner of property to keep it insured, canceled one policy on order of the company issuing it, and immediately re-insured it in another company, paid the premium, notified the assured of the transaction, and deposited the policy in his safe for the assured. This was held to be a sufficient delivery of the policy to bind the company.

⁹⁷ *McClave v. Association*, 55 N. J. Law, 187, 26 Atl. 78. But see *Fried v. Insurance Co.*, 50 N. Y. 243. In this case, however, delivery of the policy was not by its terms necessary to its validity.

⁹⁸ *Giddings v. Insurance Co.*, 102 U. S. 108, 26 L. Ed. 92; *Ormond v. Association*, 96 N. C. 158, 1 S. E. 796; *Heiman v. Insurance Co.*, 17 Minn. 153 (Gil. 127), 10 Am. Rep. 154; *Wainer v. Insurance Co.*, 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598.

⁹⁹ When the agent holds the policy for delivery upon payment of first premium, but there is no delivery by reason of default of the agent, the insured standing ready to pay, it seems that the policy is valid. *New York Life Ins. Co. v. Babcock*, 104 Ga. 67, 30 S. E. 273, 42 L. R. A. 88, 69 Am. St. Rep. 134.

Where there was no payment of the premium due upon a life policy, and payment of only one-half of the premium due had been waived, it was held that a letter by the agent to the applicant stating that "your policy has arrived" did not show such a state of facts as amounted to a constructive delivery. *Union Cent. Life Ins. Co. v. Pauly*, 8 Ind. App. 85, 35 N. E. 190.

¹⁰⁰ *Taylor v. Lowell*, 3 Mass. 331, 3 Am. Dec. 141; *Hendricks v. Insurance Co.*, 8 Johns. (N. Y.) 1; *Lindauer v. Insurance Co.*, 13 Ark. (8 Eng.) 461.

¹⁰¹ *Blue Grass Ins. Co. v. Cobb* (Ky.) 72 S. W. 1099; *Myers v. Insurance Co.*, 27 Pa. 268, 67 Am. Dec. 462; *Millville Mut. Marine & Fire Ins. Co. v. Collierd*, 38 N. J. Law (9 Vroom) 480.

Same—Where Insurer Holds Policy for Insured.

By extending the principle just considered, it becomes apparent that the policy may become effective even though it never leaves the possession of the insurer. If the instrument is completely executed, and held by the insurer either subject to the order of the insured or ready for transmission to him, it is sufficiently delivered and binding upon the parties, the assent of the insured having already been given in the application submitted.¹⁰² This principle is well illustrated by the leading case of *Xenos v. Wickham*,¹⁰³ in which a policy of insurance was completely executed, purporting on its face to have been signed, sealed, and delivered by the proper officers of the insuring company, the premium due was debited to the broker, in accordance with whose instructions the policy had been executed, but the instrument itself remained in possession of the company at the time of the loss. To quote the language of the Lord Chancellor (Chelmsford): "Now, although the policy was thus retained by the officers of the company when formal execution of it had taken place, they held it for the plaintiffs, whose property it became from that moment. It is a mistake to suppose, as some of the learned judges have done, that the policy wanted its complete binding effect till it was delivered to and accepted by Lascaridi. The usage of insurance companies to keep the policy until sent for by the assured or his broker is not for the purpose of completing the instrument by a delivery personally to the party or his agent, but merely as a matter of convenience."¹⁰⁴

PAYMENT OF FIRST PREMIUM.

67. The parties may make such agreement concerning the payment of the first premium as they may desire, and such agreement, whether express or implied, must be performed or waived. In the absence of express agreement it is generally understood that prepayment of the first premium is not necessary to the validity of an oral preliminary contract, but that payment must be made upon delivery of the policy. When, however, it is expressly agreed that the contract shall not become binding until the first premium has been paid, no contract, oral or written, can be validly made unless such prepayment has been made or waived.

The great number of cases involving questions relating to the payment of the first premium arise rather out of the difficulty of making

¹⁰² See *Xenos v. Wickham*, 2 H. L. Cas. 296; *Baldwin v. Insurance Co.*, 56 Mo. 151, 17 Am. Rep. 671; *Keim v. Insurance Co.*, 42 Mo. 38, 97 Am. Dec. 291; *Commercial Mut. Marine Ins. Co. v. Union Mut. Ins. Co.*, 19 How (U. S.) 318, 15 L. Ed. 636.

¹⁰³ L. R. 2 Eng. & Irish App. Cas. 296.

¹⁰⁴ L. R. 2 Eng. & Irish App. Cas. 296 (at page 320).

proper inferences of fact than of determining the principles of law applicable. It is clear that, as a matter of law, any agreement made by the parties with reference to the premium will be enforced, and that, if the insured has failed to perform his promise of payment, he is in no position to demand performance of the insurer in case of loss. As a practical matter, however, in deciding questions as to the payment of the first premium, three serious difficulties present themselves: (1) In any given case, what was the agreement of the parties, as a matter of fact; (2) what constitutes payment; and (3) what amounts to a valid waiver.

The Agreement to Pay Premiums.

The express agreement presents little difficulty. If the payment of the first premium is made a condition precedent to the liability of the insurer, the party insured cannot recover either on a preliminary oral contract or on the written policy unless such condition has been fulfilled or waived.¹⁰⁸ So, if the premium is agreed to be paid at some time subsequent to the making of the contract, the insurer's liability attaches at once.¹⁰⁹ A promise to pay a premium will support a promise to indemnify as well as a cash payment. "Insurance can be sold on credit as well as anything else."¹⁰⁷

When, however, no express stipulation is made as to the time or manner of payment, and the intention of the parties must be inferred

¹⁰⁸ *Oliver v. Insurance Co.*, 97 Va. 134, 33 S. E. 536; *St. Louis Mut. Life Ins. Co. v. Kennedy*, 69 Ky. (6 Bush) 450; *Ormond v. Association*, 96 N. C. 153, 1 S. E. 796; *Helman v. Insurance Co.*, 17 Minn. 153 (Gil. 127), 10 Am. Rep. 154. Payment by a third party with the money of the insured, but without his knowledge, is of no effect. *Whiting v. Insurance Co.*, 129 Mass. 240, 37 Am. Rep. 317. See *Giddings v. Insurance Co.*, 102 U. S. 108, 26 L. Ed. 92.

In *Meyer v. Insurance Co.*, 73 N. Y. 516, 29 Am. Rep. 200, plaintiff held a participating policy on the life of her husband. The custom of the parties had been to apply the dividends on the premiums, and, their amount being thus uncertain, the defendant had been in the habit of furnishing the plaintiff with an annual statement of the amount required to renew the policy. Receiving no statement for 1874, the plaintiff wrote for it, inclosing a money order for the amount she supposed would be requisite. If the defendant had answered her letter promptly, the plaintiff would have had time enough to make the payment, but she received no answer until three months later, when the order was returned with the statement that the policy was canceled for nonpayment of premium. The plaintiff tendered the proper amount, which was refused. Held, that the plaintiff was entitled to have the policy declared in force, and that formal annual tender of premium was not necessary, but the judgment should provide for the payment of premiums due, with interest.

¹⁰⁹ *Franklin Fire Ins. Co. v. Colt*, 20 Wall. (U. S.) 560, 22 L. Ed. 423; *First Baptist Church Trustees v. Brooklyn Fire Ins. Co.*, 28 N. Y. 153.

¹⁰⁷ *Croft v. Insurance Co.*, 40 W. Va. 508, 21 S. E. 854, 52 Am. St. Rep. 902; *Jones v. Insurance Co.*, 168 Mass. 245, 47 N. E. 92.

from all the circumstances of the transaction, great difficulty is experienced and much confusion has arisen. On principle and authority it would seem that the true rule should be derived from that applying in the somewhat analogous case of a sale of a chattel, when, in the absence of agreement to the contrary, cash is to be paid upon the delivery of the article sold. So a preliminary contract of insurance will become binding without payment of the premium,¹⁰⁸ but the premium is payable in cash upon delivery of the policy.¹⁰⁹ In other words, the payment of the premium and the delivery of the policy are mutually dependent upon each other.¹¹⁰ Of course, credit may be given at the time of delivering the policy, provided the agent has authority so to do.

What Constitutes Payment.

Any transaction that will constitute payment of any premium will be sufficient to satisfy the condition of prepayment of the first premium, so as to make the contract operative. This point will therefore be treated under the general topic of payment of premiums.¹¹¹ It may be here remarked, however, that a partial payment of a required premium will not validate a policy¹¹² unless the acceptance of such sum by the insurer is under such circumstances as to show a waiver of the requirement of full payment.¹¹³

¹⁰⁸ *Franklin Fire Ins. Co. v. Colt*, 20 Wall. (U. S.) 560, 22 L. Ed. 423. *Eames v. Insurance Co.*, 94 U. S. 621, 627, 24 L. Ed. 298; *Firemen's Ins. Co. v. Kuessner*, 164 Ill. 275, 45 N. E. 540.

¹⁰⁹ But if the policy is delivered to the assured, nothing being said about payment, a presumption is raised that a short credit was intended. *Boehen v. Insurance Co.*, 35 N. Y. 131, 90 Am. Dec. 787; *Miller v. Insurance Co.*, 12 Wall. (U. S.) 285, 20 L. Ed. 398.

In *Fidelity & Casualty Co. v. Chambers*, 93 Va. 138, 24 S. E. 896, 40 L. R. A. 432, it was held that possession of the policy by the assured is such evidence of the payment of the premium as, upon a demurrer to the evidence, is conclusive upon the court.

¹¹⁰ *Audubon v. Insurance Co.*, 27 N. Y. 216 (at page 223), *Denio*, C. J. If a binding preliminary contract has been made, the right of the insured to tender the premium and receive the policy agreed upon is in no wise affected by the previous destruction of the property insured. *Commercial Mut. Marine Ins. Co. v. Union Mut. Ins. Co.*, 19 How. (U. S.) 318, 15 L. Ed. 636.

Nor is the insured under any obligation to disclose the loss occurring after the contract has been completed by parol. *Baldwin v. Insurance Co.*, 56 Mo. 151, 17 Am. Rep. 671; *Keim v. Insurance Co.*, 42 Mo. 38, 97 Am. Dec. 291. *Merchants' Mut. Ins. Co. v. Lyman*, 15 Wall. (U. S.) 664, 21 L. Ed. 246, seems to lay down a different rule. In that case, however, the remarks of *Miller, J.*, should be regarded as obiter dictum, inasmuch as no oral contract was proved.

¹¹¹ See post, p. 201.

¹¹² *Barnes v. Insurance Co.*, 74 N. C. 22, 5 Bigelow, Ins. Cas. 420; *Carlock v. Insurance Co.*, 138 Ill. 210, 28 N. E. 53; *Brown v. Insurance Co.*, 59 N. H. 298, 47 Am. Rep. 206.

¹¹³ *Nebraska & I. Ins. Co. v. Christensen*, 29 Neb. 572, 45 N. W. 924, 26

Waiver of Agreement for Prepayment.

Even though the parties may have expressly agreed that the contract shall not be deemed complete until payment of the premium in cash and in full, this stipulation may be waived by the insurer or any of his agents having competent authority.¹¹⁴ As a general rule, any agent having power to execute and issue contracts on behalf of the insurer has power to waive a condition of prepayment.¹¹⁵ And an absolute delivery of the policy by such an agent, without payment of the premium, under such circumstances as will justify an inference that credit is to be given, will constitute a waiver of a condition of prepayment.¹¹⁶ It seems that an intention to give credit may be inferred from the mere fact of unconditional delivery without requiring present payment.¹¹⁷ Nor do the courts show great readiness to find that a delivery was made subject to a condition of immediate payment.

Am. St. Rep. 407; *Cole v. Insurance Co.*, 22 Wash. 26, 60 Pac. 68, 47 L. R. A. 201.

¹¹⁴ *Farnum v. Insurance Co.*, 83 Cal. 246, 23 Pac. 869, 17 Am. St. Rep. 233; *Eagan v. Insurance Co.*, 10 W. Va. 583; *O'Brien v. Insurance Co. (C. C.)* 22 Fed. 586. A custom of collecting premiums on the first of each month for insurance effected during the previous month operates as a waiver of immediate payment when no special demand is made. *Potter v. Insurance Co. (C. C.)* 63 Fed. 382. See, also, as to waiver by custom, *Peoria Sugar Refinery v. Susquehanna Mut. Fire Ins. Co. (C. C.)* 20 Fed. 480; *Long v. Insurance Co.*, 137 Pa. 335, 20 Atl. 1014, 21 Am. St. Rep. 879. Failure of the agent to urge applicant to pay does not constitute waiver. *Union Cent. Life Ins. Co. v. Pauly*, 8 Ind. App. 85, 35 N. E. 190. Waiver may be shown by direct proof that credit was given, or may be inferred from the circumstances. *Bodine v. Insurance Co.*, 51 N. Y. 117, 10 Am. Rep. 566.

Delivery of the policy may constitute waiver. *Wood v. Insurance Co.*, 32 N. Y. 619, and cases cited in note 117, *infra*.

¹¹⁵ See cases cited in note 114, *supra*; also, see: *Elkins v. Insurance Co.*, 113 Pa. 386, 6 Atl. 224; *Newark Mach. Co. v. Kenton Ins. Co.*, 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768; *Mississippi Valley Life Ins. Co. v. Neyland*, 9 Bush (Ky.) 430. In *Bowman v. Insurance Co.*, 59 N. Y. 521, it was held that the condition requiring prepayment could be waived by agent, even though the policy in terms provided otherwise. A mutual company is not bound by waiver of its officer contrary to its by-laws and regulations. *Baxter v. Insurance Co.*, 1 Allen (Mass.) 297, 79 Am. Dec. 730; *Mulrey v. Insurance Co.*, 4 Allen (Mass.) 116, 81 Am. Dec. 689. As to waiver by mutual companies, see, also, *Susquehanna Mut. Fire Ins. Co. v. Elkins*, 124 Pa. 484, 17 Atl. 24, 10 Am. St. Rep. 608. See note 24, p. 81, *supra*.

¹¹⁶ *Miller v. Insurance Co.*, 12 Wall. (U. S.) 285, 20 L. Ed. 398; *Boehen v. Insurance Co.*, 35 N. Y. 131, 90 Am. Dec. 787; *Wytheville Insurance & Banking Co. v. Telger*, 90 Va. 277, 18 S. E. 195; *Southern Life Ins. Co. v. Booker*, 9 Heisk. (Tenn.) 606, 24 Am. Rep. 344; *Wood v. Insurance Co.*, 32 N. Y. 619; *McAllister v. Insurance Co.*, 101 Mass. 558, 3 Am. Rep. 404, *Woodruff, Ins. Cas.* 140.

¹¹⁷ *Boehen v. Insurance Co.*, 35 N. Y. 131, 90 Am. Dec. 787; *Miller v. Insurance Co.*, 12 Wall. (U. S.) 285, 20 L. Ed. 398, and note; *Sheldon v. Insurance Co.*, 26 N. Y. 460, 84 Am. Dec. 231.

Thus, in *Sheldon v. Atlantic Fire & Marine Ins. Co.*,¹¹⁸ the agent of the insurer mailed to the plaintiff a policy containing the usual condition that it should not be considered binding until the premium was actually paid. With the policy was sent a letter in which the agent wrote: "Should you decline the policy, please return it by return mail; if you retain it, please send me the amount, \$29.50." The plaintiff neither returned the policy nor paid the premium, but upon destruction of the property covered by the policy he sought to enforce payment by the insurer. The court held that the delivery was unconditional, thus waiving the condition of prepayment, and that the acceptance of the plaintiff, by retaining the policy, completed the contract. It would seem that the opinion of the dissenting judges, that the delivery was conditioned upon payment of the premium specified, was the more correct. Indeed, in a later case¹¹⁹ very similar in its facts, but seemingly presenting clearer proof of an intention to waive prepayment, it was held that the delivery was upon condition of immediate payment.¹²⁰ It would seem, on principle, that in all cases where policies are put into the hands of applicants for the purpose of examination, or subject to rejection, such delivery should be considered conditional, and not as constituting a waiver of conditions of prepayment.¹²¹

Delivery of Policy Containing Receipt for Premium.

An interesting question, closely related to the one just discussed, is as to the effect of an acknowledgment on the face of a policy that the first

¹¹⁸ 26 N. Y. 460, 84 Am. Dec. 231.

¹¹⁹ *Wood v. Insurance Co.*, 32 N. Y. 619. In this case the agent of the insurance company filled up two policies and left them with the plaintiff's clerk, in the plaintiff's absence, with the understanding that when the plaintiff returned he should pay the premium if he accepted, and return the policies if he declined them. It was proved that the agent sent a messenger three times to the plaintiff, with instructions to ask for the premiums or the policies. The first time the plaintiff was out. The next time the messenger asked him for the premium, and he told him to call again. The last time he at first directed his clerk to draw a check for the premium, but afterwards countermanded his direction, and said he would call on the agent and see him about another loss, as to which he expressed some dissatisfaction. The next day the fire occurred. The plaintiff claimed that by his not returning the policies he accepted them, but the court, by a majority of five to three, refused to sustain such contention.

¹²⁰ But see *Boehen v. Insurance Co.*, 35 N. Y. 131, 90 Am. Dec. 787; *Miller v. Insurance Co.*, 12 Wall. (U. S.) 285, 20 L. Ed. 398.

¹²¹ A waiver may be shown by any other facts clearly indicating an intention on the part of the insurer not to insist upon the condition. Thus, where the insured paid the first premium to an agent who had no authority to receive it, and who never accounted for it to the insurer, it was held that a subsequent recognition of the policy as valid by the insurer amounted to a waiver of the condition of prepayment. *Mauck v. Insurance Co. (Del. Super.)* 54 Atl. 952.

premium has been paid, when in fact the policy has been delivered without such payment. Although there is some conflict of opinion among the authorities,¹²² the prevailing opinion seems to be that such a receipt concludes the insurer as far as the validity of the policy is concerned, but is only prima facie evidence of payment in so far as the premium itself is concerned;¹²³ that is, the insurer cannot deny the truth of the receipt in an action against him on the policy, but may do so in an action against the insured for the purpose of recovering the premium due.¹²⁴ In most of the cases, however, in which this

¹²² See 1 Joyce, Ins. § 86.

¹²³ *Southern Life Ins. Co. v. Booker*, 9 Heisk. (Tenn.) 606, 24 Am. Rep. 344; *Phil. Ins. § 512 et seq.*; 3 Kent, Comm. 260. In *Ormond v. Association*, 96 N. C. 158, 1 S. E. 796, the policy provided that it should not be in force until actual payment of the annual dues. The policy was delivered with a receipt attached acknowledging the payment of the dues, signed by the president, but the receipt stated that it must be countersigned by the agent. The dues were not in fact paid until after loss, and the receipt was not countersigned by the agent. The insured had notice of this stipulation by the application, and it was held that payment of the dues was a condition precedent to make the policy effectual, and the company could set up the nonpayment to defeat policy. In *Kline v. Association*, 111 Ind. 462, 11 N. E. 620, 60 Am. Rep. 703, the policy was by its terms incontestable except for fraud, and contained a receipt for the premium. The premium was not paid, but the insured gave an order for same on his employer, who, at his request, refused to pay it. This order expressly stipulated that, if it was not paid, the insured's rights should be forfeited, but nevertheless it was held that, as against the beneficiary, the company was estopped to deny the payment of the premium and forfeit the policy. See, also, *Brooklyn Life Ins. Co. v. Miller*, 12 Wall. (U. S.) 285, 20 L. Ed. 398; *Union Life Ins. Co. v. Winn*, 87 Ill. App. 257; *Boehen v. Insurance Co.*, 35 N. Y. 131, 90 Am. Dec. 787; *Farnum v. Insurance Co.*, 83 Cal. 246, 23 Pac. 869, 17 Am. St. Rep. 233; *Sheldon v. Insurance Co.*, 26 N. Y. 460, 84 Am. Dec. 231; *Basch v. Insurance Co.*, 35 N. J. Law, 429, 5 Benn. Fire Ins. Cas. 421; *Dobyns v. Association*, 144 Mo. 95, 45 S. W. 1107. In *Brown v. Insurance Co.*, 59 N. H. 298, 47 Am. Rep. 205, it was held that there was no estoppel. The receipt was separate from the policy.

¹²⁴ See *Basch v. Insurance Co.*, 35 N. J. Law, 429, 5 Benn. Fire Ins. Cas. 421, where it is said in an able opinion by Beasley, C. J.: "This policy, executed by the president and secretary of the company, contains a formal acknowledgment of the payment of the premium in question, and, in my opinion, this should prevent the defendants from averring or showing nonpayment for the purpose of denying that the contract ever had any legal existence. What does this receipt, in its connection with the delivery of the instrument, import, if it does not mean that the payment of the premium is conclusively admitted to the extent that such payment is necessary to give validity to the contract? Unless this be its meaning, it serves no legal office, for it does not mean that the money has been actually received. It is true that there is an express declaration that the policy is to have no effect until the premium shall have been paid; but in this same instrument is an equally express statement that the act on which the contract is to become efficacious has been done. * * * The usual legal rule is that a receipt is only prima

statement is made, the facts show a waiver of the condition of prepayment, upon which the judgment is based, rather than on any estoppel arising out of the acknowledgment of payment made in the policy. In fact, some of the most extreme cases allowing the insured to recover without complying with the condition of prepayment of the premium are to be found in New York, where the doctrine is not accepted.¹²⁵

WHAT PAPERS FORM THE WRITTEN CONTRACT.

68. IN GENERAL—The contract of insurance, as usually made, contains the following elements:

- (a) All terms legally set forth on the face of the policy, or on the back thereof, if properly referred to.
- (b) All separate papers expressly designated and made part of the contract by the terms of the policy, such as applications and surveys.
- (c) All riders attached to the policy with the consent of both parties.
- (d) In case of corporate insurers, all provisions of the insurer's charter.
- (e) All statutes applicable, as well as the fixed rules of the common law.

Any discussion of the component elements of the insurance contract is but the application to the peculiar phases of this subject of two well-known rules of law: (1) All prior negotiations or agreements are merged in any written memorial to which the parties may have reduced their agreement; and (2) all persons are presumed to know the law of their jurisdiction, and to contract with reference to it.

The first problem that confronts us, then, is to determine what papers go to make up this written memorial, behind which the parties are estopped to go. The basis of this "integration," to use Prof. Wigmore's word,¹²⁶ is the policy. Every contractual term on the face of this instrument at the time of its delivery, or written in thereafter with the consent of both parties, is a part of the written agreement. It is

facie evidence of payment, and may be explained; but this rule does not apply when the question involved is not only as to the fact of payment, but as to the existence of rights springing out of the contract. With a view of defeating such rights the party giving the receipt cannot contradict it. An acknowledgment of an act done, contained in a written contract, and which act is requisite to put it in force, is as conclusive against the party making it as is any other part of the contract. It cannot be contradicted or varied by parol."

¹²⁵ *Sheldon v. Insurance Co.*, 26 N. Y. 460, 84 Am. Dec. 231; *Baker v. Insurance Co.*, 43 N. Y. 283, 287; *How v. Insurance Co.*, 80 N. Y. 32.

¹²⁶ 1 Greenl. Ev. (16th Ed.) § 305b.

immaterial whether such terms are written or printed;¹²⁷ whether they appear in the body of the policy or on the margin thereof;¹²⁸ they are equally binding if consented to.

But this is not true of conditions or other indorsements appearing on the back of the policy unless reference is made to them on its face.¹²⁹ And it has been held recently by the Supreme Court of the United States¹³⁰ that the words, "See back," printed on the face of a contract, are not such a reference as will make conditions printed on the back binding terms of the agreement. When, however, additional terms are written on the other half of the sheet containing the policy

¹²⁷ Where there are both printed and written terms, they should, if possible, be so construed as to stand together, but where there is repugnance the written provisions prevail over those printed. *Minnock v. Insurance Co.*, 90 Mich. 236, 51 N. W. 367; *Reynolds v. Insurance Co.*, 47 N. Y. 597; *Nelson v. Insurance Co.*, 71 N. Y. 453; *NICOLET v. INSURANCE CO.*, 3 La. 366, 23 Am. Dec. 458; *Kratzenstein v. Assurance Co.*, 116 N. Y. 54, 22 N. E. 221, 5 L. R. A. 799; *Fire Ins. Ass'n v. Merchants' & Miners' Transp. Co.*, 66 Md. 339, 7 Atl. 905, 59 Am. Rep. 162; *Pilinsky v. Insurance Co. (C. C.)* 32 Fed. 47; *FAUST v. INSURANCE CO.*, 91 Wis. 158, 64 N. W. 883, 30 L. R. A. 783, 51 Am. St. Rep. 876. An indorsement exempting the company from liability, except in case of total loss, controls. *Chadsey v. Guion*, 97 N. Y. 333; *Burt v. Insurance Co.*, 78 N. Y. 400. Where, on issuing the policy, the insurers write across the policy "Privilege for \$4,500 additional insurance," such indorsement is a waiver of notice of additional insurance within the amount specified, although the printed part of the policy requires notice to be given of any additional insurance. *Benedict v. Insurance Co.*, 31 N. Y. 389. Where a printed condition released the company from liability for loss by lightning, written indorsement, "Covering loss by lightning," will prevail over printed clause. *Haws v. Insurance Co.*, 130 Pa. 113, 15 Atl. 915, 2 L. R. A. 52. In many states it is provided that no condition in a policy shall operate to defeat it unless printed in type of certain size or written in pen and ink; e. g., Code Va. 1887, § 3252.

¹²⁸ *Guerlain v. Insurance Co.*, 7 Johns. (N. Y.) 527; *Burt v. Insurance Co.*, 78 N. Y. 400; *WRIGHT v. ASSOCIATION*, 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731, 16 Am. St. Rep. 749.

The clause in a marine policy relating to the perils of the seas, men of war, enemies, etc., is controlled by the marginal statement in the policy, "Warranted free from loss or expense arising from capture, seizure, or detention, etc.," which constitutes a warranty on the part of the assured. *Swinnerton v. Insurance Co.*, 37 N. Y. 174, 93 Am. Dec. 560. For illustration of the varying force given to marginal "catchwords" in different jurisdictions, see *McQuitty v. Insurance Co.*, 15 R. I. 573, 10 Atl. 635, and *Bruce v. Insurance Co.*, 58 Vt. 253, 2 Atl. 710.

¹²⁹ *Planters' Mut. Ins. Co. v. Rowland*, 66 Md. 236, 7 Atl. 257; *Ford v. Relief Co.*, 148 Mass. 153, 19 N. E. 169, 1 L. R. A. 700; *Blackerby v. Insurance Co.*, 83 Ky. 574.

In the following cases the indorsements on the back were referred to on the face of the policy, and were held binding: *Kensington Nat. Bank v. Yerkes*, 86 Pa. 227; *Porter v. Insurance Co.*, 160 Mass. 183, 35 N. E. 678; *HARRIS v. INSURANCE CO.*, 5 Johns. (N. Y.) 368.

¹³⁰ *The Majestic*, 166 U. S. 375, 17 Sup. Ct. 597, 41 L. Ed. 1039.

proper, or on a sheet of paper attached thereto, they are presumed to form part of the contract, even in the absence of reference.¹³¹

Separate Papers—Application and Survey.

It is not necessary that a writing of any kind shall be fully set forth in the body of any given contract in order to become a part of it. By proper reference indicating clearly that the parties intend to be bound by the terms of a separate paper, it can be made a part of the written contract just as completely as if copied in full on its face.¹³² It is not easy to state just what reference to such separate papers is sufficient to incorporate them in the policy,¹³³ and there seems to be no little confusion in the cases on this point, resulting, usually, from the efforts

¹³¹ *Roberts v. Insurance Co.*, 3 Hill (N. Y.) 501; *Murdock v. Insurance Co.*, 2 N. Y. 210; *Duncan v. Insurance Co.*, 6 Wend. (N. Y.) 483, 22 Am. Dec. 539; *Goldman v. Insurance Co.*, 48 La. Ann. 223, 19 South. 132.

¹³² *CLARK v. INSURANCE CO.*, 8 How. (U. S.) 235, 12 L. Ed. 1061; *Standard Life & Accident Ins. Co. v. Martin*, 133 Ind. 376, 33 N. E. 105; *Jennings v. Insurance Co.*, 2 Denio (N. Y.) 75; *BURRITT v. INSURANCE CO.*, 5 Hill (N. Y.) 188, 40 Am. Dec. 345; *KENTUCKY & L. MUT. INS. CO. v. SOUTHWARD*, 8 B. Mon. (Ky.) 634; *Daniels v. Insurance Co.*, 12 Cush. (Mass.) 423, 59 Am. Dec. 192; *Holmes v. Insurance Co.*, 10 Metc. (Mass.) 211, 43 Am. Dec. 428; *Day v. Insurance Co.*, 1 McArthur (D. C.) 41, 29 Am. Rep. 565; *Bobbitt v. Insurance Co.*, 66 N. C. 70, 8 Am. Rep. 494; *Weinberger v. Insurance Co.*, 41 La. Ann. 31, 5 South. 728; *Sun Fire Office v. Wich*, 6 Colo. App. 103, 39 Pac. 587.

¹³³ See cases cited supra, note 131. In *Vilas v. Insurance Co.*, 72 N. Y. 590, 28 Am. Rep. 186, "As per application No. 1234" was held insufficient. In *BURRITT v. INSURANCE CO.*, 5 Hill (N. Y.) 188, 40 Am. Dec. 345, the application was referred to "as forming a part of this policy," and this was held sufficient. In *Throop v. Insurance Co.*, 19 Mich. 423, the policy provided "that if this policy be made and issued upon, or refer to, an application, such application shall be considered a part of the contract and a warranty by the insured," and it was held that this did not make the application a part of the contract, so as to render it necessary that it should be set forth in stating the contract, unless its terms were such as to be capable of being impressed with the character of warranties by force of the stipulations it contained. There was a strong dissenting opinion. In *ACCIDENT INS. CO. v. CRANDAL*, 120 U. S. 527, 7 Sup. Ct. 685, 30 L. Ed. 740, the only mention of the application in the policy was, "In consideration of the warranties made in the application for this insurance," and it was said that the application was not a part of the policy, but only those statements in the application which were warranties; but in *Standard Life & Accident Ins. Co. v. Martin*, 133 Ind. 376, 33 N. E. 105, where there was the statement in the policy, "In consideration of the statement of facts warranted to be true in the application for this policy, and of the payment," etc., it was held that the application so referred to in the policy was a part of the contract.

In a recent important case in the Supreme Court of the United States, it was held that, where the application states that it is subject to the charter of the company and laws of the state of New York, but the policy is executed and delivered in the state of Washington, referring to the application as the consideration for the policy, the application is no part of the policy, and the

made by the courts to avoid the forfeitures that are often worked by making the application part of the policy, and the statements therein warranties.¹²⁴ Thus, in a Michigan case¹²⁵ the broad statement is made that: "The written application for insurance, the policy issued thereon, and the note given by the assured, being all but parts of one and the same transaction, must be resorted to and treated as but one instrument for the purpose of ascertaining and determining the rights of the parties." In *Phoenix Mut. Life Ins. Co. v. Raddin*,¹²⁶ the application was held to be no part of the policy, which contained the following term: "This policy is issued and accepted by the assured upon the following express conditions: * * * If any of the declarations or statements made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, this policy shall be null and void."

The separate papers thus incorporated in the policy are most frequently the application and the survey¹²⁷ that sometimes accompanies the application for property insurance. Premium notes given upon delivery of the policy or thereafter are also often thus made parts of the contract.¹²⁸ But it has been held that a receipt given for the first

laws of Washington must govern the rights of the parties. *Mutual Life Ins. Co. v. Cohen*, 179 U. S. 262, 21 Sup. Ct. 106, 45 L. Ed. 181.

See dictum in *Lycoming Fire Ins. Co. v. Jackson*, 83 Ill. 302, 25 Am. Rep. 386, to effect that insured is not bound by unauthorized application, though made a part of the contract by the policy which is received by him.

¹²⁴ In *AMERICAN POPULAR LIFE INS. CO. v. DAY*, 39 N. J. Law (10 Vroom) 89, 23 Am. Rep. 198, the application contained an agreement that the answers and statements should "be the basis and form part of the contract or policy, and, if the same be not in all respects true and correctly stated, the said policy shall be void, according to the terms thereof." The policy declared that the insurance was "in consideration of the representations," etc. The court said the application was not a part of the contract, and the policy would be void only in case of fraud or intentional misrepresentation.

To do away with the uncertainty on this point, and to prevent the hardships that have often resulted from forfeitures due to working warranties into the policy by reference to an unseen application or to unknown by-laws, statutes have been passed in many states declaring that the application or by-laws shall not be considered a part of the contract between the parties unless copies of these papers shall be attached to the policy. See *Laws Pa. 1881*, p. 20; *RITTER v. INSURANCE CO.*, 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693; *Manhattan Life Ins. Co. v. Myers*, 109 Ky. 372, 59 S. W. 30.

¹²⁵ *American Ins. Co. v. Stoy*, 41 Mich. 385, 1 N. W. 877.

¹²⁶ *PHOENIX MUT. LIFE INS. CO. v. RADDIN*, 120 U. S. 183, 7 Sup. Ct. 500, 30 L. Ed. 644.

¹²⁷ *Sheldon v. Insurance Co.*, 22 Conn. 235, 58 Am. Dec. 424; *Farmers' Ins. & Loan Co. v. Snyder*, 16 Wend. (N. Y.) 481, 30 Am. Dec. 118.

¹²⁸ *American Ins. Co. v. Story*, 41 Mich. 385, 1 N. W. 877; *Continental Ins. Co. v. Dorman*, 125 Ind. 189, 25 N. E. 213; *Laughlin v. Association*, 8 Tex. Civ. App. 448, 28 S. W. 411.

premium before the issue of the policy was no part of the policy, which did not refer to it.¹²⁹

Advertising Circulars and Prospectuses.

It would seem clear on principle that prospectuses and circulars issued by insurers for the purpose of securing business cannot be parts of written contracts subsequently executed unless expressly made so by reference, as in the case of other papers. They may contain representations which, if false, might be ground for an action in deceit or for a suit for rescission or reformation of a policy executed, but it is difficult to see how such loose papers could be admitted as evidence to vary the terms of policies which make no reference to them. Yet in a Kentucky case¹⁴⁰ a party to a policy, which by its terms was declared forfeited upon failure to pay any premium at maturity, was given paid-up insurance because a circular shown to him in order to induce him to insure had stated that paid-up insurance would be given under certain conditions. Other authorities, notably the English cases,¹⁴¹ can be found supporting this view, but the weight of authority is plainly against it.¹⁴²

Riders Binding without Reference.

In the conduct of insurance business it often becomes necessary to add a new term to a policy, or to modify or waive an existing term. For this purpose insurers are accustomed to use little printed slips containing the desired writing, which are attached to the policy with mucilage, and termed "riders." By reason of being annexed to the policy, these riders are equally binding on the parties as if written on the face of the policy, and hence require no reference to be made a part of the contract.¹⁴³

¹²⁹ *New York Life Ins. Co. v. Babcock*, 104 Ga. 67, 30 S. E. 273, 42 L. R. A. 88, 69 Am. St. Rep. 134.

¹⁴⁰ *Southern Mut. Life Ins. Co. v. Montague*, 84 Ky. 653, 2 S. W. 443, 4 Am. St. Rep. 218.

¹⁴¹ *Wood v. Dwarries*, 11 Exch. (Hurl. & G.) 493; *Collett v. Morrison*, 9 Hare, 162; *Salvin v. James*, 6 East, 571. But see the later case of *Wheulton v. Hardisty*, 8 El. & B. 285, 92 Eng. C. L. 231.

¹⁴² *RUSE v. INSURANCE CO.*, 23 N. Y. 516, 24 N. Y. 653; *Clemmitt v. Insurance Co.*, 76 Va. 355; *Fowler v. Insurance Co.*, 116 N. Y. 339, 22 N. E. 576, 5 L. R. A. 805; *Mutual Ben. Life Ins. Co. v. Ruse*, 8 Ga. 534; *MacIntyre v. Insurance Co.*, 82 Ga. 478, 9 S. E. 1124.

¹⁴³ *Mascott v. Insurance Co.*, 68 Vt. 253, 35 Atl. 75; *Haws v. Association*, 114 Pa. 431, 7 Atl. 159; *Jackson v. Assurance Co.*, 106 Mich. 47, 63 N. W. 899, 30 L. R. A. 636, and note; *Hardy v. Insurance Co.*, 166 Mass. 210, 44 N. E. 209, 33 L. R. A. 241, 55 Am. St. Rep. 395; *Gunther v. Insurance Co. (C. C.)* 34 Fed. 501; *Phenix Ins. Co. v. Wilcox & Gibbs Guano Co.*, 65 Fed. 724, 13 C. C. A. 88, 25 U. S. App. 201; *St. Paul Fire & Marine Ins. Co. v. Kidd*, 53 Fed. 238, 5 C. C. A. 88, 14 U. S. App. 201; *Mark v. Insurance Co. (D. C.)*

Charter Provisions.

All persons are charged with knowledge of public acts.¹⁴⁴ Therefore, when the insurer is a corporation created by public act, all parties are conclusively presumed to contract with reference to the provisions of its charter, which thereby become terms of any contract made by it, and prevail over any other terms that may be repugnant.¹⁴⁵ The by-laws of a corporation, however, are not presumed to be known to the public, and do not form any part of the ordinary contract of insurance,¹⁴⁶ except by proper reference.

Public Statutes as Parts of Contract.

The law with reference to which a policy is executed governs absolutely the rights of the parties thereto. Neither can the parties by their stipulations either change or subvert the purpose of the law.¹⁴⁷ Therefore it is properly said that the law writes into every contract

52 Fed. 170; *Pool v. Insurance Co.*, 91 Wis. 530, 65 N. W. 54, 51 Am. St. Rep. 919.

An early Texas case (*GODDARD v. INSURANCE CO.*, 67 Tex. 69, 1 S. W. 906, 60 Am. Rep. 1) merely said that the provisions in the rider were not warranties. See *Kelley-Goodfellow Shoe Co. v. Liberty Ins. Co.*, 8 Tex. Civ. App. 227, 28 S. W. 1027; *American Fire Ins. Co. v. First Nat. Bank* (Tex. Civ. App.) 30 S. W. 384; *Home Ins. Co. v. Cary*, 10 Tex. Civ. App. 300, 31 S. W. 321; *American Fire Ins. Co. v. Center* (Tex. Civ. App.) 33 S. W. 551.

¹⁴⁴ *Clark, Corp.* 174; *McCormick v. Bank*, 165 U. S. 550, 17 L. Ed. 433, 41 L. Ed. 821; *De La Vergne Refrigerating Mach. Co. v. German Sav. Inst.*, 175 U. S. 59, 20 Sup. Ct. 20, 44 L. Ed. 62.

This rule does not apply to foreign corporations. The terms of their charters do not bind insured unless brought to his notice. *City Fire Ins. Co. v. Carrugi*, 41 Ga. 660.

The discussion of this question necessarily involves a consideration of the difficult subject of ultra vires contracts of corporations. See *Clark, Corp.* pp. 170-187.

¹⁴⁵ But see *Denver Fire Ins. Co. v. McClelland*, 9 Colo. 11, 9 Pac. 771, 59 Am. Rep. 134, holding that, the insured having performed his part of the contract, the company was estopped to set up its want of power to issue the policy. See, also, to same effect: *Bloomington Mut. Ben. Ass'n v. Blue*, 120 Ill. 121, 11 N. E. 331, 60 Am. Rep. 558.

¹⁴⁶ But members of a mutual company are bound by the by-laws of such company. *Infra*, p. 191.

¹⁴⁷ *Pietri v. Seguenot*, 96 Mo. App. 258, 69 S. W. 1055; *Union Cent. Life Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421, 36 L. R. A. 271, 64 Am. St. Rep. 715; *Hermany v. Association*, 151 Pa. 17, 24 Atl. 1064; *Queen Ins. Co. v. Leslie*, 47 Ohio St. 409, 24 N. E. 1072, 9 L. R. A. 45; *White v. Society*, 163 Mass. 108, 39 N. E. 771, 27 L. R. A. 398; *Knights Templar & Masons' Life Indemnity Co. v. Jarman*, 187 U. S. 197, 23 Sup. Ct. 108, 47 L. Ed. 139; *Wall v. Society* (C. C.) 32 Fed. 273; *Fletcher v. Insurance Co. (C. C.)* 13 Fed. 528; (*NEW YORK LIFE INS. CO. v. FLETCHER*, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934, on another point); *Washington Cent. Bank v. Hume*, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370; *Manhattan Life Ins. Co. v. Warwick*, 20 Grat. (Va.) 614, 3 Am. Rep. 218; *Germania Ins. Co. v. Rudwig*, 80 Ky. 223; *BRADY v. INSURANCE CO.*, 11 Mich. 425 (ordinance of town council);

all existing statutes that are applicable to the transaction, and they become parts of the contract as completely as if the parties had copied them in full on its face. And further, these terms render null and void any other provisions agreed upon by the parties which may be in conflict with these terms written by the hand of the law.¹⁴⁸ Thus, in a striking case decided by the Virginia Court of Appeals,¹⁴⁹ the policy in suit made all the statements of the application warranties, breach of which, whether material or immaterial, would avoid the policy. But the policy also provided that it should be construed as having been made in the city of Cincinnati, Ohio. The law of Ohio therefore governed the contract, and among the Ohio statutes was an act declaring that no misstatement in an application for insurance should bar the right of the insured to recover on a policy issued upon such application unless proved to be fraudulent or material. The court held the Ohio statute a part of this Ohio contract, and the insurer therefore liable despite the untruth of an immaterial statement in the application, which under the terms of the policy would have avoided the con-

OSHKOSH GASLIGHT CO. v. GERMANIA FIRE INS. CO., 71 Wis. 454, 37 N. W. 819, 5 Am. St. Rep. 233.

¹⁴⁸ This raises the question as to what law governs the construction of the contract. Any extended discussion of such question would be out of place in an elementary work, but the following principles may be taken as established:

(1) In absence of express stipulation the law of the place where the contract is consummated applies. The contract is usually completed by the delivery of the policy. *Daniels v. Insurance Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192; *Manhattan Life Ins. Co. v. Warwick*, 20 Grat. (Va.) 614, 3 Am. Rep. 318; *Knights Templar & Masons' Life Indemnity Co. v. Berry*, 50 Fed. 511, 1 C. C. A. 561, 4 U. S. App. 353; *Mutual Ben. Life Ins. Co. v. Robison* (C. C.) 54 Fed. 580; *Heebner v. Insurance Co.*, 10 Gray (Mass.) 131, 69 Am. Dec. 308; *King Brick Mfg. Co. v. Phoenix Ins. Co.*, 164 Mass. 291, 41 N. E. 277; *Seamans v. Knapp-Stout & Co. Company*, 89 Wis. 171, 61 N. W. 757, 27 L. R. A. 362, 46 Am. St. Rep. 825; *Marden v. Insurance Co.*, 85 Iowa, 584, 52 N. W. 509, 39 Am. St. Rep. 316; note to *McGarry v. Nicklin*, 55 Am. St. Rep. 40, pp. 51-53; *Mutual Life Ins. Co. v. Cohen*, 179 U. S. 262, 21 Sup. Ct. 106, 45 L. Ed. 181.

(2) But, where there is no principle of public policy involved, the parties may make an agreement that their contract shall be construed by the laws of another jurisdiction. *Union Cent. Life Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421, 36 L. R. A. 271, 64 Am. St. Rep. 715; *Washington Cent. Bank v. Hume*, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370; *PENNSYLVANIA MUT. LIFE INS. CO. v. MECHANICS' SAV. BANK & TRUST CO.*, 72 Fed. 413, 19 C. C. A. 286, 37 U. S. App. 692, 38 L. R. A. 33.

(3) Where a principle of public policy has been declared by statute, the law of the forum will prevail over conflicting provisions in the policy. *Pietri v. Seguenot*, 96 Mo. App. 258, 69 S. W. 1055; *Cravens v. Insurance Co.*, 148 Mo. 583, 50 S. W. 519, 53 L. R. A. 305, 71 Am. St. Rep. 628.

¹⁴⁹ *Union Cent. Life Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421, 36 L. R. A. 271, 64 Am. St. Rep. 715.

tract.¹⁵⁰ So in *Hartford Fire Ins. Co. v. Bourbon County Court*,¹⁵¹ very recently decided in Kentucky, it was held that, under a statute fixing the liability of the insurer, in case of total loss, at the estimated value of the property insured as written in the policy, the insurers were liable for \$50,000, the entire sum written in policies upon a court house that had been totally destroyed by fire, notwithstanding stipulations in the policies that the insurers should be liable only for the actual cash value of the property at the time of loss, which the insurers offered to prove was only some \$34,000.

A three-fourths value clause in a policy is inoperative when opposed by a statute making the insurer liable for the full amount of the insurance;¹⁵² and, where a statute requires notice before forfeiture of insurance for nonpayment of premiums, an agreement in the policy that it shall be forfeited without notice upon failure to pay any premium is of no effect.¹⁵³ Nor is an express waiver of the benefit of the statute binding, since a public interest is involved.¹⁵⁴

The same principle makes all marine policies subject not only to the

¹⁵⁰ For a somewhat similar case, see *Nielsen v. Society*, 139 Cal. 332, 73 Pac. 168, 96 Am. St. Rep. 146, in which a policy delivered in California was held subject to a statute of New York, in which state the insuring corporation had its domicile.

¹⁵¹ 72 S. W. 739.

¹⁵² *Germania Ins. Co. v. Ashby*, 112 Ky. 303, 65 S. W. 611, 23 Ky. Law Rep. 1564; *Home Fire Ins. Co. v. Bean*, 42 Neb. 537, 60 N. W. 907, 47 Am. St. Rep. 711; *Hickerson v. Insurance Co.*, 96 Tenn. 193, 33 S. W. 1041, 32 L. R. A. 172; *Queen Ins. Co. v. Leslie*, 47 Ohio St. 409, 24 N. E. 1072, 9 L. R. A. 45; *Reilly v. Insurance Co.*, 43 Wis. 449, 28 Am. Rep. 552.

¹⁵³ *Warner v. Association*, 100 Mich. 157, 58 N. W. 667; *Wall v. Society (C. C.)* 32 Fed. 273; *Griffith v. Insurance Co.*, 101 Cal. 627, 36 Pac. 113, 40 Am. St. Rep. 96; *Equitable Life Assur. Soc. v. Nixon*, 81 Fed. 796, 26 C. C. A. 620; *Same v. Trimble*, 83 Fed. 85, 27 C. C. A. 404. In *Caffery v. Insurance Co. (C. C.)* 27 Fed. 25, it was held that an act of the Legislature providing that upon the payment of the first premium the policy should remain in force for a certain time for the full amount thereof, "anything in the policy to the contrary notwithstanding," might be waived by the express agreement of the parties for the substitution of a nonforfeitable policy of a different character.

¹⁵⁴ "The statute in question is regarded as indicative of the legislative will that, as a matter of public policy, life insurance companies should be deprived of the power to declare policies forfeited for nonpayment of premiums, except in the prescribed mode, and that, being deprived of the power so to do, a waiver on the part of the insured cannot be construed to confer such power in the face of the law which has taken it away." Per Searles, C., in *Griffith v. Insurance Co.*, 101 Cal. 627, 36 Pac. 113, 40 Am. St. Rep. 96.

As to the right of the insured to waive a statute intended for his sole benefit, the authorities are by no means harmonious. It would seem that the insured should be allowed to waive the provisions of a statute, where such waiver is not prohibited, and there is no principle of public policy or morals concerned.

The provisions of an act against avoidance of the policy on account of il-

public acts of the sovereignty under which they are written, but also to all treaty regulations to which that sovereignty is a party. As said by Lord Stowell:¹⁵⁵ "Every treaty is part of the private law of each of the countries which are parties to it, and is as binding on the subjects of each as any part of their own municipal laws." Consequently, any term in a marine policy contrary to a provision of any such treaty is necessarily void.¹⁵⁶

Common-Law Rules.

The rules of the common law, when fixed by proper authority, are not less to be read into a contract of insurance than are the provisions of statutes, though such rules, perhaps, are more apt to yield to the expressed contrary intention of the parties, and, in the nature of things, are somewhat less certain in their application. Thus the policy of the law will not allow a recovery that otherwise might be had under the terms of a contract of insurance, when the insured intentionally burns the property insured,¹⁵⁷ or, according to some authorities, when the insured takes his own life,¹⁵⁸ or commits a crime that is the occasion of his coming to an unexpected death by the hand of the law,¹⁵⁹ or when the beneficiary feloniously causes the death of the insured.¹⁶⁰

correct statements in application, unless fraudulently made or material to the risk, cannot be waived. *Hermany v. Association*, 151 Pa. 17, 24 Atl. 1064.

¹⁵⁵ *The Eenrom*, 2 C. Rob. 1, 6.

¹⁵⁶ *Bird v. Appleton*, 8 T. R. 562, 2 Arn. Ins. (Ed. 1901) § 746; *Hughes, Admiralty*, 63.

¹⁵⁷ *Citizens' Ins. Co. v. Marsh*, 41 Pa. 386.

Where the property is burned by the agent of the insured, the company will not be released from liability, unless it is shown that the insured was particeps criminis. *Henderson v. Insurance Co.*, 10 Rob. (La.) 164, 43 Am. Dec. 176; *Feibelman v. Assurance Co.*, 108 Ala. 180, 19 South. 540; *Perry v. Insurance Co. (C. C.)* 11 Fed. 435; *Plinsky v. Insurance Co. (C. C.)* 32 Fed. 47. See, also, *Hartford Fire Ins. Co. v. Williams*, 63 Fed. 925, 11 C. C. A. 503, 27 U. S. App. 493.

Burning by assured while insane will not relieve company from liability. *Karow v. Insurance Co.*, 57 Wis. 56, 15 N. W. 27, 46 Am. Rep. 17.

In an action on a policy of insurance on a mare, where it appeared that plaintiff beat her violently with an iron rod, and that she died from the effects of such beating, it was held he could not recover. *Western Horse & Cattle Ins. Co. v. O'Neill*, 21 Neb. 548, 32 N. W. 581.

¹⁵⁸ *RITTER v. INSURANCE CO.*, 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693. But there is a conflict of authority on this point, for which see *infra*, p. 516.

¹⁵⁹ *Burt v. Insurance Co.*, 187 U. S. 362, 23 Sup. Ct. 139, 47 L. Ed. 216; *AMICABLE SOC. v. BOLLAND*, 4 Bligh (N. S.) 194, 2 Bigelow, Ins. Cas. 240.

¹⁶⁰ *New York Mut. Life Ins. Co. v. Armstrong*, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997; *Schmidt v. Association*, 112 Iowa, 41, 83 N. W. 800, 51 L. R. A. 141, 84 Am. St. Rep. 323. For a full discussion of these questions, see post, chapter 14.

Usage as Part of the Contract.

It is sometimes said by the authorities that a well-established usage may become a part of a contract of insurance.¹⁶¹ However true this may be of parole contracts, it can be true only in a limited sense of written policies. A formal written contract merges all previous parole agreements or understandings of any kind whatsoever, and there is no reason whatever for allowing the terms of a written contract to be altered or enlarged by parole proof of a usage.¹⁶² It is therefore well settled that a usage cannot be proved that is in contravention of any term in a policy, or that adds to it any term.¹⁶³ Thus, a custom among insurers to give notice of the maturity of premiums cannot give to the insured any right to such notice not conferred by the policy.¹⁶⁴ But a usage may always be shown in order to make clear the intention of the parties, and the sense in which ambiguous terms have been used.¹⁶⁵

SAME—MUTUAL BENEFIT INSURANCE.**69. The constituent elements of the contract made by a member of a mutual benefit society are:**

- (a) The charter and constitution, or articles of association, in accordance with which the society has its being.
- (b) The certificate of membership, so far as consistent with the charter and constitution, and the application if expressly so made.
- (c) The by-laws of the society, provided they have been properly adopted and do not conflict with the terms of the certificate.

¹⁶¹ *Connelly v. Association*, 58 Conn. 552, 20 Atl. 671, 9 L. R. A. 428, 18 Am. St. Rep. 296.

¹⁶² *Harris v. Carson*, 7 Leigh (Va.) 632, 30 Am. Dec. 510.

¹⁶³ *Richardson v. Insurance Co. (Ky.)* 18 S. W. 165; *Grace v. Insurance Co.*, 109 U. S. 283, 3 Sup. Ct. 207, 27 L. Ed. 932; *Hearne v. Insurance Co.*, 20 Wall. (U. S.) 488, 22 L. Ed. 395; *Ripley v. Insurance Co.*, 30 N. Y. 136, 86 Am. Dec. 362.

¹⁶⁴ *Thompson v. Insurance Co.*, 104 U. S. 252, 26 L. Ed. 765.

A mere usage of the company to accept past due premiums is not binding on the company. *Easley v. Insurance Co.*, 91 Va. 161, 21 S. E. 235.

But a usage may be shown to prove a subsequent parole modification of the terms of the policy, and, in view of the tendency of the courts to construe a contract so as to avoid forfeitures, it seems but very little evidence is needed. See *Sweetser v. Association*, 117 Ind. 97, 17 N. E. 722; *MAYER v. INSURANCE CO.*, 38 Iowa, 304, 18 Am. Rep. 34. See, also, *Union Cent. Life Ins. Co. v. Pottker*, 33 Ohio St. 459, 31 Am. Rep. 555; *Meyer v. Insurance Co.*, 73 N. Y. 516, 29 Am. Rep. 200; *Hartford Life & Annuity Ins. Co. v. Unsell*, 144 U. S. 439, 12 Sup. Ct. 671, 36 L. Ed. 496; *New York Life Ins. Co. v. Eggleston*, 96 U. S. 572, 24 L. Ed. 841.

¹⁶⁵ *Renner v. Bank*, 9 Wheat. (U. S.) 581, 6 L. Ed. 166; *Allegre v. Insurance Co.*, 6 Har. & J. (Md.) 408, 14 Am. Dec. 289; *Whitmarsh v. Insurance Co.*, 16 Gray (Mass.) 359, 77 Am. Dec. 414; *Mooney v. Insurance Co.*, 138

In General.

While the contracts made by benevolent and fraternal organizations with their members, so far as they grant indemnity for loss by reason of death, sickness, or other misfortune, are clearly contracts of insurance, yet in their form and effect they differ largely from the contracts of regular old-line insurers. Organized for the purpose of relieving distress among its members, the benefit society owes a duty to each member, the measure of which is ordinarily to be found primarily in its constitution or articles of association. The provisions of the constitution, or the articles of association, must be consistent with the law of the land, and also with the law of the society's being—its charter.¹⁶⁶ These may be said to be a part of the constitution in the same sense in which the act of incorporation and public statutes are said to be a part of the policy issued by regular insurance corporations. Nothing further is required in order to complete a contract between the society and its members upon the basis of its constitution than the mere admission to membership.¹⁶⁷ But in the administration of the affairs of such societies, many of which are large and extend over wide areas, it is found necessary for the governing body to adopt, from time to time, rules of administration, called "by-laws." Since these by-laws are adopted by the agents of the members of the society, they are binding upon all such members unless they are contrary to its constitution or are unreasonable. Accordingly, in such cases the contract of the member with his society is to be found in the properly adopted by-laws, and in the society's charter and constitution.¹⁶⁸ Many of these organizations conduct their business on this plan, no personal or individual contract being executed.

The Certificate as a Contract.

With the higher organization of these societies, however, as well as for convenience in the conduct of business, it was found advantageous to issue to members certificates of membership. These certificates, first intended, doubtless, to be used as vouchers, soon began to be used

Mass. 375, 52 Am. Rep. 277; *Fabbri v. Insurance Co.*, 55 N. Y. 129. But see *Orient Mut. Ins. Co. v. Wright*, 1 Wall. (U. S.) 456, 17 L. Ed. 505.

¹⁶⁶ *Railway Passenger & Freight Conductors' Mut. Aid & Ben. Ass'n v. Robinson*, 147 Ill. 138, 35 N. E. 168; *Metropolitan Safety Fund Acc. Ass'n v. Windover*, 137 Ill. 417, 27 N. E. 538; *Supreme Lodge K. P. v. La Malta*, 95 Tenn. 157, 31 S. W. 493, 30 L. R. A. 838; *Rosenberger v. Insurance Co.*, 87 Pa. 207; *Golden Rule v. People*, 118 Ill. 492, 9 N. E. 342; *Chicago Mut. Life Indemnity Ass'n v. Hunt*, 127 Ill. 257, 20 N. E. 55, 2 L. R. A. 549.

¹⁶⁷ *Bishop v. Grand Lodge*, 112 N. Y. 627, 20 N. E. 562.

The society may require initiation to make the membership complete. *Matkin v. Supreme Lodge*, 82 Tex. 301, 18 S. W. 306, 27 Am. St. Rep. 886.

¹⁶⁸ *Dolan v. Court of Good Samaritan*, 128 Mass. 437; *Baldwin v. Fraternity*, 47 N. J. Law, 111; *Nibl. Ben. Soc. & Acc. Ins.* § 136, *Bac. Ben. Soc.* § 161.

as vehicles of contract, showing the particular benefits which the holders were entitled to receive at the hands of the society. Manifestly, such certificates are very different instruments from insurance policies. They are but imperfect expressions of the contract, which is to be found in its complete form only by reading the certificate in connection with the charter, constitution, and by-laws of the society.¹⁶⁹ So these certificates are not ordinarily assignable,¹⁷⁰ nor can a beneficiary take any vested right in them.¹⁷¹ The terms of benefit certificates, however, are binding on the society in so far as they are authorized. Necessarily any agreement in the certificate inconsistent with the charter or constitution is absolutely void.¹⁷²

Conflict between Certificate and By-Law.

The law applicable when a certificate is issued containing terms inconsistent with the by-laws is well stated by Marshall, J., in *McCoy v. Northwestern Mut. Relief Ass'n*:¹⁷³ "While the decisions are not numerous on this subject, there is no substantial conflict, and we understand the general principle to be firmly established that though,

¹⁶⁹ *Hellenberg v. I. O. B. B.*, 94 N. Y. 580; *Supreme Commandery Knights of Golden Rule v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332; *Masonic Mut. Ben. Soc. v. Burkhart*, 110 Ind. 192, 10 N. E. 79, 11 N. E. 449; *American Legion v. Smith*, 45 N. J. Eq. 466, 17 Atl. 770; *Railway Passenger & Freight Conductors' Mut. Aid & Ben. Ass'n v. Robinson*, 147 Ill. 138, 35 N. E. 168; *Holland v. Taylor*, 111 Ind. 121, 12 N. E. 116; *Gray v. Supreme Lodge*, 118 Ind. 293, 20 N. E. 833; *Sabin v. National Union*, 90 Mich. 177, 51 N. W. 202; *Laker v. Fraternal Union*, 95 Mo. App. 353, 75 S. W. 705.

¹⁷⁰ *Briggs v. Earl*, 139 Mass. 473, 1 N. E. 847; *Basye v. Adams*, 81 Ky. 368. But where the charter provided for its organization for the benefit of widows, etc., or legatees of deceased members, it was held that, as a creditor was capable of becoming a beneficiary as legatee, an assignment of the certificate by the member in his lifetime to the creditor, as security for the debt, was but an irregularity in the mode of designation, which could not be questioned by the widow, the society having recognized it as valid. *Martin v. Stubbings*, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620.

¹⁷¹ "Most of the decisions seem to concur in holding that in case of mutual benefit societies the beneficiary named in the certificate of membership acquires no vested right to the benefit to accrue upon the death of the member until the death occurs." *Martin v. Stubbings*, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620. See *Nibl. Ben. Soc. & Acc. Ins.* § 201 et seq. And see post, p. 400, chapter 11.

A certificate in a fraternal beneficiary society is a mere expectancy and the beneficiary has no vested right therein. *Fisher v. Donovan*, 57 Neb. 361, 77 N. W. 778, 44 L. R. A. 383; *Schmidt v. Association*, 112 Iowa, 41, 83 N. W. 800, 51 L. R. A. 141, 84 Am. St. Rep. 323, and note, page 331. *Holland v. Taylor*, 111 Ind. 125, 12 N. E. 116. But see, contra, *Pittinger v. Pittinger*, 28 Colo. 308, 64 Pac. 195, 89 Am. St. Rep. 198.

¹⁷² *Golden Rule v. People*, 118 Ill. 492, 9 N. E. 342; *Rockhold v. Society*, 129 Ill. 440, 21 N. E. 794, 2 L. R. A. 420.

¹⁷³ 92 Wis. 577, 68 N. W. 697, 47 L. R. A. 681.

generally speaking, a member of a mutual benefit association or insurance company is bound to take notice of its by-laws, even if not cited or referred to in the certificate of membership or policy, yet, when such certificate or policy and the by-laws conflict, so long as the contract as written is within the power of the association under its charter or articles of organization, it will prevail over the by-laws, and by it the rights and liabilities of the parties must be determined."¹⁷⁴

Indeed, in the light of recent decisions this statement of the law can be still further extended. If the parties so desire, they may agree that the by-laws shall be no part of their contract, confining it to the certificate and the application.¹⁷⁵ The same result may be accomplished by the failure to attach a copy of the by-laws to the certificate when required by statute.¹⁷⁶

By-Laws Subsequently Adopted or Changed.

Incident to the right to make by-laws for the conduct of its business is the right to change or repeal those by-laws and to adopt others.¹⁷⁷ Such amendments and changes will, in general, be binding upon all members of the association, provided they are reasonable, if made after notice to all members.¹⁷⁸ This is especially true if the society's constitution or by-laws existing at the time of the member's admission provided a method of amendment which had been followed;¹⁷⁹ or if, as is usually the case, the member had agreed to be bound by all existing by-laws and those thereafter to be adopted. But, even when the member has so bound himself, the presumption is strong that new by-laws are intended to be only prospective, and only a clearly manifested intent will extend them to previously issued certificates.¹⁸⁰

¹⁷⁴ See, to the same effect, *Laker v. Fraternal Union*, 95 Mo. App. 353, 75 S. W. 705; *Davidson v. Society*, 39 Minn. 303, 39 N. W. 803, 1 L. R. A. 482; *Failey v. Fee*, 83 Md. 83, 34 Atl. 839, 32 L. R. A. 311, 55 Am. St. Rep. 326; *Morrison v. Insurance Co.*, 59 Wis. 162, 18 N. W. 13; *Nibl. Ben. Soc. & Acc. Ins.* § 147.

¹⁷⁵ *Purdy v. Association*, 101 Mo. App. 91, 74 S. W. 486.

¹⁷⁶ *Mooney v. Grand Lodge (Ky.)* 72 S. W. 288. But see, contra, *Dickinson v. A. O. U. W.*, 159 Pa. 258, 28 Atl. 293; *Lithgaw v. Supreme Tent*, 165 Pa. 292, 30 Atl. 830.

¹⁷⁷ *Supreme Lodge K. P. v. Knight*, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409; *Nibl. Ben. Soc. & Acc. Ins.* § 28; *Bac. Ben. Soc.* § 91a.

¹⁷⁸ *Nibl. Ben. Soc. & Acc. Ins.* § 24; *Supreme Lodge K. P. v. Knight*, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409.

¹⁷⁹ *Metropolitan Safety Fund Acc. Ass'n v. Windover*, 137 Ill. 417, 27 N. E. 538; *Bac. Ben. Soc.* § 135.

¹⁸⁰ *Benton v. Brotherhood*, 146 Ill. 570, 34 N. E. 939; *Strauss v. Association*, 126 N. C. 971, 36 S. E. 352, 123 N. C. 465, 39 S. E. 55, 54 L. R. A. 605, 83 Am. St. Rep. 699. Appended to this case (83 Am. St. Rep., at page 706), is an extensive note on "The effect of changes of by-laws of beneficial associations as against pre-existing members."

Moreover, such changes or new by-laws must be reasonable; and they will be held unreasonable if they take away a property right,¹⁸¹ or if, without knowledge or consent of the member, the right of notice before forfeiture for nonpayment of assessments was taken away,¹⁸² or if the member is deprived of the right to engage in certain occupations not prohibited at the time of his admission.¹⁸³ By-laws that are reasonable as to members admitted after their adoption may be held unreasonable as to those whose rights as members have become fixed under prior regulations.¹⁸⁴

¹⁸¹ *Weber v. Supreme Tent*, 172 N. Y. 490, 65 N. E. 258, 92 Am. St. Rep. 753; *Wist v. Grand Lodge*, 22 Or. 271, 29 Pac. 610, 29 Am. St. Rep. 603.

Even when the insured has expressly agreed to be governed by all the by-laws of the society then existing or thereafter to be adopted, a subsequently adopted by-law reducing the amount to be paid to the insured is unreasonable as to him, and void. *Russ v. Sup. Council*, 110 La. 588, 34 South. 697; *Newhall v. Supreme Council*, 181 Mass. 111, 63 N. E. 1; *Knights Templar & Masons' Life Indemnity Co. v. Jarman*, 104 Fed. 638, 44 C. C. A. 93. See, also, *Miller v. Tuttle (Kan.)* 73 Pac. 88.

¹⁸² *Thibert v. Supreme Lodge*, 78 Minn. 448, 81 N. W. 220, 47 L. R. A. 136, 79 Am. St. Rep. 412.

¹⁸³ *Tebo v. Supreme Council*, 89 Minn. 3, 93 N. W. 513; *Hobbs v. Association*, 82 Iowa, 107, 47 N. W. 983, 11 L. R. A. 299, 31 Am. St. Rep. 466.

¹⁸⁴ "It is possible that, as an original by-law, a provision of this character would be held reasonable and operative on the ground that, if persons chose to become members of an association with such drastic rules, theirs was the right to do so." *Thibert v. Supreme Lodge*, 78 Minn. 448, 81 N. W. 220, 47 L. R. A. 136, 79 Am. St. Rep. 412.

CHAPTER VI.

THE CONSIDERATION—PREMIUMS AND ASSESSMENTS.

- 70-71. In General—The Nature of the Obligation.
- 72-73. When the Premium is a Debt.
- 74-75. Payment of Premiums.
- 76. Consequences of Nonpayment of Premiums.
- 77. Forfeiture.
- 78. Excuses for Nonpayment.
- 79-80. Notice of Premiums Due.
- 81. Paid-up Policies and Extended Insurance.
- 82. Effect of Nonpayment of Premium Notes.
- 83-84. Dues and Assessments in Mutual Benefit Societies.
- 85-86. When Premiums may be Recovered.

IN GENERAL—THE NATURE OF THE OBLIGATION.

70. The consideration for the insurer's promise to indemnify is the insured's payment of a premium, or his promise to pay a premium or assessment. The insurer's liability attaches only when the insured has paid, or is liable to pay, a premium or assessment.
71. IN LIFE INSURANCE there is usually no liability assumed by the insured for the payment of premiums subsequent to the first. The contract ordinarily provides that nonpayment of premiums shall be a condition that will terminate or diminish the liability of the insurer. Unless otherwise agreed, however, assessments properly levied are legally enforceable obligations upon the insured.

No authority need be cited for the proposition that the insurance contract requires the support of a valuable consideration. The contract cannot stand unless each party has given value or become liable to the other. The value given by the insured is usually in the form of the payment of a sum of money, called a "premium,"¹ when the

¹ The premium rate must be fixed expressly or by implication in order that the contract shall be valid (*Western Assur. Co. v. McAlpin*, 23 Ind. App. 220, 55 N. E. 119, 77 Am. St. Rep. 423); and this rate should be set forth in the policy. In many states statutes have been enacted prohibiting discrimination in rates charged to "insurants" of the same class, negroes being especially mentioned in some states as persons not to be discriminated against. See *How. Ann. St. Mich. Supp.* 1883-90, p. 3420, § 4244.

To prevent discriminations in rates it is frequently provided that no rebates upon premiums shall be given, and some of the statutes make it a misdemeanor in an insurance agent to give such rebates. See, for examples, 1 *Millis' Ann. St. Colo.* 1891, p. 1341, § 2232; *Laws Md.* 1890, p. 275, c. 254.

Such statutes are constitutional, and do not improperly restrict the right

consideration is executed; and the liability assumed is to pay a postponed premium, or an assessment, when the consideration is executory.

In insurance policies it is usually stated that the insurance is made "in consideration of the representations made in the application for this policy," and of certain sums paid and payable as premiums. This does not mean, however, that the statements in the application are any part of the consideration in the technical sense, such as requires to be pleaded in an action on the policy.³

In the discussion of the nature of the contract in a previous chapter, it was explained that in theory all payments of premiums and assessments were but contributions from all members of the insuring organization to make good the losses of individual members, and that the chief distinction between "premiums" and "assessments" lay in the fact that the former were levied and paid to meet anticipated losses, while the latter were collected in order to make good actual losses. Out of this distinction grow important differences as to the liability of the insured, especially in life insurance, which must now be examined.

Liability for Life Insurance Premiums.

The life insurance contract does not become binding upon the insurer until the insured has either paid or promised to pay the first premium.⁴ But when the contract has thus gone into effect, some peculiarities about it become noticeable, and these have given rise to some difference of opinion as to its nature. In so far as it is executory, the ordinary life policy is purely unilateral. The insured is not positively bound to do anything whatsoever; he nowhere promises to pay any premium that may fall due; he merely agrees that, if he fails to pay, his rights under the policy shall be forfeited or otherwise affected. Even though the policy may state that the premium is payable annually, no promise to pay will be implied, such an implication being inconsistent with the penalizing spirit of the whole contract.⁵ But what

of contracting freely or prevent competition. *Equitable Life Assur. Soc. v. Com. (Ky.)* 67 S. W. 389; *Com. v. Equitable Life Assur. Soc.*, 100 Ky. 341, 38 S. W. 491.

³ *PHENIX MUT. LIFE INS. CO. v. RADDIN*, 120 U. S. 183, 7 Sup. Ct. 500, 30 L. Ed. 644, *Woodruff, Ins. Cas.* 92.

⁴ *Helman v. Insurance Co.*, 17 Minn. 153 (Gil. 127), 10 Am. Rep. 154; *Walner v. Insurance Co.*, 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598; *Bradley v. Insurance Co.*, 32 Md. 108, 3 Am. Rep. 121.

⁵ *Goodwin v. Insurance Co.*, 73 N. Y. 480; *Worthington v. Insurance Co.*, 41 Conn. 372, 19 Am. Rep. 495, 510.

⁶ In *Goodwin v. Insurance Co.*, 73 N. Y. 480, an unpaid premium upon a policy of life insurance was held not to be an "indebtedness," within the meaning of the statute of Massachusetts, providing for the continuance and validity of such a policy for a limited period after failure to pay the premium, and for ascertaining the period in each case. Therefore the unpaid pre-

is the promise made by the insurer? Is it a contract of insurance for one year, coupled with an agreement to renew from year to year upon the payment of the stipulated premium as a condition precedent? Or is it a single contract for insurance during the lifetime of the insured, subject, however, to defeasance by nonpayment of any premium, when due, as a condition subsequent? The former view, upheld by a few courts,⁶ is thus clearly stated by Carpenter, J., in *Worthington v. Charter Oak Life Ins. Co.*:⁷ "A contract of life insurance is a peculiar contract. It has no parallel, and few analogies, in all the business transactions of life. An ordinary life policy, like the one in suit, requiring the payment of annual premiums, consists of two parts, and is divisible. The applicant, upon the payment of the first premium, effects an insurance upon his life for one year, and purchases a right to continue that insurance from year to year, during life, at the same rate. Whether he will continue it or not is optional with him. The premium for the first year pays for the risk during that year, and for the right to subsequent insurance. The rate of insurance for a single year is less than the annual premiums on a life policy. The difference, continued, as it is supposed it will be, from year to year through life, may be regarded as the consideration for the right to continue the insurance." The other view, which is supported by the clear weight of authority,⁸ and seemingly by clear reason, may be best presented in the words of Mr. Justice Bradley, in *New York Life Ins. Co. v. Statham*:⁹ "We agree with the court below that the contract is not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premium, but that it is an entire contract of assurance for life, subject to discontinuance and forfeiture for nonpayment of any of the stipulated premiums. Such is the form of the contract, and such is its character. It has been contended that the payment of each premium is the consideration for insurance during

mum could not be deducted from the net value of the policy, in determining the amount of premium for temporary insurance. In this case the court said: "According to the terms of the policy, there is no promise to pay, and it rests with the insured to say how long he will continue it. He can stop it at the end of the year, and determine when the policy shall cease. When he refuses to pay, the policy lapses, and the insured has no further claim, except what is conferred by the nonforfeiture clause."

⁶ *Worthington v. Insurance Co.*, 41 Conn. 372, 19 Am. Rep. 495; *Dillard v. Insurance Co.*, 44 Ga. 119, 9 Am. Rep. 167; *Want v. Blunt*, 12 East, 183.

⁷ 41 Conn. 372, 379, 19 Am. Rep. 495-497.

⁸ *NEW YORK LIFE INS. CO. v. STATHAM*, 93 U. S. 24, 23 L. Ed. 789; *KLEIN v. INSURANCE CO.*, 104 U. S. 90, 26 L. Ed. 663; *People v. Insurance Co.*, 78 N. Y. 114, 34 Am. Rep. 528, holding an insolvent company liable in damages to holders of current policies; *Abell v. Insurance Co.*, 18 W. Va. 400, at page 426; *Mutual Benefit Life Ins. Co. v. Robertson*, 59 Ill. 123, 14 Am. Rep. 8; *Pritchard v. Society*, 3 C. B. (N. S.) 622.

⁹ *NEW YORK LIFE INS. CO. v. STATHAM*, 93 U. S. 24, 30, 23 L. Ed. 789.

the next following year, as in fire policies. But the position is untenable. It often happens that the assured pays the entire premium in advance, or in five, ten, or twenty, annual installments. Such installments are clearly not intended as the consideration for the respective years in which they are paid, for, after they are all paid, the policy stands good for the balance of the life insured, without any further payment. Each installment is, in fact, part consideration of the entire insurance for life. It is the same thing where the annual premiums are spread over the whole life. The value of assurance for one year of a man's life when he is young, strong, and healthy is manifestly not the same when he is old and decrepit. There is no proper relation between the annual premium and the risk of assurance for the year in which it is paid. This idea of assurance from year to year is the suggestion of ingenious counsel. The annual premiums are an annuity, the present value of which is calculated to correspond with the present value of the amount assured, a reasonable percentage being added to the premiums to cover expenses and contingencies. The whole premiums are balanced against the whole insurance."

It may be further said in elaboration of what is intimated by the words of Mr. Justice Bradley, just quoted, that the theory of the Connecticut case wholly ignores the fact that the ordinary life insurance contract possesses certain investment features, which render it radically different from the fire policy, which is a contract of pure insurance from year to year.

Liability for Assessments.

But the member of the mutual assessment organization makes a very different contract. The consideration for the organization's promise to indemnify the member is the member's promise to pay all assessments that are legally made during the term of his membership, and the fact that his contract provides for a forfeiture of all his rights as a member of the society as a penalty for failure to pay any assessment does not prevent the member from being liable for the amount of such assessment in an action maintained by the society.¹⁰ The payment of the assessment may be enforced even though the defendant's certificate is already forfeited and the society is insolvent.¹¹ Of course, it is com-

¹⁰ *Ellerbe v. Barney*, 119 Mo. 632, 25 S. W. 384, 23 L. R. A. 435; *New Era Life Ass'n v. Rossiter*, 132 Pa. 314, 19 Atl. 140; *Akers v. Hite*, 94 Pa. 394, 39 Am. Rep. 792. See, also, *McDonald v. Ross-Lewin*, 29 Hun (N. Y.) 87.

On principle these cases are clearly correct. The member, having received protection during his membership, cannot escape liability on assessments levied during such membership.

¹¹ Such assessments may be levied by the receiver of an insolvent association under the instructions of the court. *Bacon v. Clyne*, 70 Mich. 183, 33 N. W. 207. But, of course, a member who has secured the cancellation of his certificate, paying all existing liabilities to the association, is not liable to

petent, however, for the parties to agree that forfeiture of rights under the membership certificate shall be the only consequence of nonpayment,¹² and in practice the penalty of forfeiture is, in effect, the sole means relied on by the society to enforce payment of assessments.

WHEN THE PREMIUM IS A DEBT.

72. In fire and marine insurance the premium payable becomes a debt as soon as the risk attaches, and may, by provision of the policy or by statute, be made a lien upon the property insured.
73. In life insurance the premium becomes a debt only when, in the case of the first premium, the contract has become binding, and, in the case of subsequent premiums, when the insurer has continued the insurance, after maturity of the premium, in consideration of the insured's express or implied promise to pay. An assessment properly levied, unless otherwise expressly agreed, is a debt.

Fire Insurance Premiums.

In marine and fire insurance, prepayment of the premium is not so strictly required as a condition to the validity of the contract. Consequently, the contract being usually deemed entire for the whole term agreed upon, the whole premium becomes an obligation as soon as the risk attaches. And this is held to be the rule even when installment notes are given for insurance extending over a number of years, when it is stipulated that nonpayment of any installment shall avoid the policy.¹³ Hence the whole premium is due and payable even though

pay assessments subsequently made by a receiver. *Tolford v. Church*, 66 Mich. 431, 33 N. W. 913.

¹² See *Tolford v. Church*, 66 Mich. 431, 33 N. W. 913.

¹³ Where a policy is issued for a term of years, and premium notes, payable in annual installments, are taken, there seems to be some confusion as to whether, in case the policy is avoided before the expiration of the term, the whole amount can be collected by the insurance company. The cases seem to lay down the following rules:

(1) Where there is a distinct provision that upon failure to pay any installment the policy shall become void, but the whole amount shall be considered as earned, such provision will be given full force, and the contract will be construed as entire. *Cauffield v. Insurance Co.*, 47 Mich. 447, 11 N. W. 264; *St. Paul Fire & Marine Ins. Co. v. Coleman*, 6 Dak. 458, 43 N. W. 693, 6 L. R. A. 87; *Continental Ins. Co. v. Boykin*, 25 S. C. 323. See, also, *American Ins. Co. v. Klink*, 65 Mo. 78; *American Ins. Co. v. Henley*, 60 Ind. 515 (provision in company's charter held part of the contract).

(2) But where there is no such provision in the contract, it seems that the contract will be construed as severable, and the company cannot sue on the notes for the entire amount. *American Ins. Co. v. Stoy*, 41 Mich. 385, 1 N. W. 877.

Where a policy insured defendant's property for a period of five years, in consideration of \$41.50 cash, and a note for an additional sum, of even date

the insurance may terminate before the expiration of the whole period agreed upon,¹⁴ provided such termination be not brought about in accordance with the terms of the policy or by the wrong of the insurer.¹⁵ Of course, however, it is competent for the parties to make a contract of fire insurance from year to year during an agreed term of years, in which case the whole premium will not be considered as due upon the commencement of the risk, but from year to year, in annual installments, as earned by the insurer.¹⁶

Statutes sometimes give to mutual fire insurance companies a lien upon the property insured, to secure the payment of premium debts, and not infrequently the policies of such companies charge the insured property with a lien for premiums due.¹⁷

Life Insurance Premiums.

As explained above, a life insurance premium due is not ordinarily a debt, nonpayment being made merely a condition of forfeiture. But in case the insurer has incurred liability, without requiring prepayment of the first premium, in consideration of the insured's promise to pay, the premium due becomes a debt. So the promise of the insured to pay any subsequent premium may be implied from the mere extension of the time of payment, or made express by his giving a premium note.¹⁸

As shown above, an assessment, when once legally levied, and notice thereof given, is a binding obligation upon the insured, unless some term of the contract expressly stipulates that forfeiture of existing rights shall be the only consequence of nonpayment.¹⁹

with the policy, and due 10 months after date, the note providing that if it was not paid at maturity the policy should be null and void, "and so remain until the same shall be fully paid," in an action on the note it was held that, the contract being an entirety, the note was as much the consideration therefor as the cash payment, and, having had the benefit of the contract for 10 months, the defendant could not avoid paying the entire consideration. *Robinson v. Insurance Co.*, 51 Ark. 441, 11 S. W. 686, 4 L. R. A. 251.

¹⁴ *Tyrie v. Fletcher*, Cowp. 666; *Richards, Ins. Cas.* 265; *Plymton v. Dunn*, 148 Mass. 523, 20 N. E. 180; *Schimp v. Insurance Co.*, 124 Ill. 354, 16 N. E. 229.

¹⁵ *Supreme Council Catholic Knights of America v. Gambati*, 29 Tex. Civ. App. 80, 69 S. W. 114.

¹⁶ *American Ins. Co. v. Stoy*, 41 Mich. 385, 1 N. W. 877.

¹⁷ *People's Fire Ins. Co. v. Hartshorne*, 84 Pa. 453; *Bangs v. Skidmore*, 21 N. Y. 136.

As to rights of bona fide purchasers of property burdened with such lien, see *Mutual Assur. Soc. v. Watts*, 1 Wheat. (U. S.) 279, 4 L. Ed. 91; *Mut. Assur. Soc. v. Faxon*, 6 Wheat. (U. S.) 606, 5 L. Ed. 342; *Mut. Assur. Soc. v. Stone*, 3 Leigh (Va.) 218; *Kentucky Farmers' Mut. Ins. Co. v. Mathers*, 7 Bush (Ky.) 23, 3 Am. Rep. 286.

¹⁸ See *Sebring v. Hazard*, 128 Mich. 330, 87 N. W. 257.

¹⁹ See *supra*, p. 198.

PAYMENT OF PREMIUMS.

74. TIME AND PLACE—The premium must be paid by the insured or other person interested in the insurance, or by some one on his behalf, to the insurer or his agent authorized to accept payment, at the place and on the day specified in the contract, unless a further day be agreed upon. In the absence of stipulation for payment before a certain hour, the payment may be made at any time before midnight of the day on which it is due. If the premium is due on Sunday, payment on the following secular day is sufficient.

75. MODE—The insurer is entitled to payment in money, but may consent to payment by check, draft, or note, or by the transfer of other valuable property, or even by services rendered. An agent authorized to collect premiums has, however, ordinarily no authority to accept in payment anything but cash.

Time is usually of the essence of the promise to pay premiums, and failure to pay on the day specified in the policy constitutes such a breach of the contract as to discharge the insurer, unless the latter has expressly or impliedly agreed to an extension of time. For the purpose of sustaining the policy, payment by any person, even a stranger,²⁰ is sufficient; but only persons having an interest in the insurance, as a mortgagee, assignee, or beneficiary, or those paying at the request of any such interested persons, have a lien upon the policy for premiums paid.²¹ A mere stranger by paying a premium due secures no interest in the proceeds of the policy.²²

Where Paid and to Whom

The premium must be paid at the place specified in the policy, if any, and to the designated agent.²³ Usually it is required to be paid

²⁰ See the cases cited in notes 21 and 22, *infra*.

In the case of *Whiting v. Insurance Co.*, 129 Mass. 240, 37 Am. Rep. 317, which is sometimes cited to the contrary, payment of the first premium was a condition precedent to the contract, and it was decided upon the familiar principle that the insured must consent to insurance, otherwise it is void.

²¹ The amount of recovery is limited to the amount actually advanced. *Roller v. Moore's Adm'r*, 86 Va. 512, 10 S. E. 241, 6 L. R. A. 136; *McDonald v. Humphries*, 56 Ark. 63, 19 S. W. 234; *Connecticut Mut. Life Ins. Co. v. Burroughs*, 34 Conn. 305, 91 Am. Dec. 725; *Weisert v. Muehl*, 81 Ky. 336.

²² *Meier v. Meier*, 88 Mo. 566; *Burridge v. Row*, 1 Younge & C. Ch. 183; *Leslie v. French*, 23 Ch. Div. 552; *Leftwich v. Wells*, 101 Va. 255, 43 S. E. 364.

²³ The mere fact that the certificate or policy may designate the person appointed to receive payment of assessments or premiums as the "agent of the insured" does not change the legal effect of a payment to such agent when he is in fact the agent of the insurer. Thus in *Supreme Lodge K. P. v. Withers*, 177 U. S. 260, 20 Sup. Ct. 611, 44 L. Ed. 762, the insured had paid his dues to the secretary of his local section of the insuring order, to whom

at the home office, or to the agent in possession of a properly executed receipt. Such stipulations must be strictly complied with,²⁴ but the payment of a premium to an agent not authorized to receive it will be sufficient if the premium money actually comes to the hands of the insurer.²⁵ When no place of payment is designated, and no person specified as solely authorized to receive payments of premiums, the insured may pay to any authorized agent of the insurer.²⁶ It is the duty of the insured, however, to seek the agent to whom payment is to be made, and not that of the agent to seek the insured.²⁷ It has been held²⁸ that, when the policy is silent as to both the place where and the person to whom payment is to be made, a previous parol agreement between the agent of the insurer and the insured can be shown, to the effect that the insured would be informed how and to whom payments were to be made, and that he should not pay in any other manner. No such information having been given, it was held that the policy was not suspended in accordance with its terms by reason of the fact that a premium was due and unpaid. This decision is based on the theory that the contract of the parties was only partially reduced to writing, but it can scarcely be sound, since the prior parol agreement clearly altered the effect of the written policy.²⁹

Time of Payment—Sundays and Legal Holidays.

The policy may stipulate that the premium shall be paid at a certain hour of the day on which it falls due,³⁰ as at noon, but in the absence

payments were required to be made by the general laws of the order, which, however, declared that the local secretary should be regarded as agent of the members, and not of the order. The money paid in due time to the secretary was not transmitted by him to the general officers of the order within the time specified by its general laws, and the defendant order insisted that the rights of the insured were forfeited because of the default of the local secretary. But the court held the payment sufficient, and the insurer liable. But see *Wilber v. Insurance Co.*, 122 N. Y. 439, 25 N. E. 926.

²⁴ *New York Life Ins. Co. v. Davis*, 95 U. S. 425, 24 L. Ed. 453.

Such provisions may be waived, of course. *McNeilly v. Insurance Co.*, 86 N. Y. 23.

²⁵ *Mauck v. Insurance Co.* (Del. Super.) 54 Atl. 952 [1903].

²⁶ *Southern Life Ins. Co. v. McCain*, 96 U. S. 84, 24 L. Ed. 653.

The payment is binding even though the company never in fact receives the premiums. *American Fire Ins. Co. v. Brooks*, 83 Md. 22, 34 Atl. 373.

²⁷ *McIntyre v. Insurance Co.*, 52 Mich. 188, 17 N. W. 781.

²⁸ *Blackerby v. Insurance Co.*, 83 Ky. 574.

²⁹ See *Union Mut. Life Ins. Co. v. Mowry*, 96 U. S. 545, 24 L. Ed. 674.

³⁰ *Penn Plate Glass Co. v. Insurance Co.*, 189 Pa. 255, 42 Atl. 138, 69 Am. St. Rep. 810.

A great many interesting questions arise as to the computation of time. In the absence of clearly expressed intention to the contrary, it seems that, where the insurance is to be "from" a certain day, that day is to be excluded in computing the time. Thus a policy insuring against fire "from

of such stipulation the insured has the whole day in which to make payment, and is not in default until midnight.³¹

If the premium falls due on Sunday, the insured has the whole of the next day in which to make payment, unless, of course, it was due at noon on Sunday, when payment would be made at or before noon on Monday.³² Thus, where the insured died Monday afternoon, a recovery was allowed on a policy the premium on which had become due on the Sunday preceding, and remained unpaid at the time of the insured's death.³³

But the same rule does not apply to legal holidays, unless insurance business is suspended on such days by the statute, as well as transactions with commercial paper, which is rarely the case. Therefore it has been held that, when an assessment became payable on Thanksgiving Day, a tender of the amount on the following day was too late to avoid a forfeiture.³⁴ It is probable, however, that a tender of a premium payable to an agent having a customary place of business would be validly made at such place of business in case it were found closed on a legal holiday.

When the premium is payable at a distant place, money sent by mail or express must be sent so as to be received at the place of payment on

the 14th of February until the 14th of August" covers a loss on the 14th of the latter month. *Isaacs v. Insurance Co.*, L. R. 5 Exch. 296. See, also, *South Staffordshire Tramways Co. v. Assur. Assoc.* [1891] 1 Q. B. 402; *Howard's Case*, 2 Salk. 625; *Supreme Council American Legion of Honor v. Gootee*, 89 Fed. 941, 32 C. C. A. 436, 61 U. S. App. 617; *Walker v. Insurance Co.*, 167 Mass. 188, 45 N. E. 89.

An insurance policy on goods to be shipped "between" two designated days does not cover goods on either of such days. *Atkins v. Insurance Co.*, 5 Metc. (Mass.) 439, 39 Am. Dec. 692.

Where a policy of insurance expired at 12 o'clock noon, and the vessel was lost on the day when it expired, and, the time of the two places differing on account of the difference of their longitude, the loss occurred before noon by the time of the place where the contract was made, and after noon by the time of the place of the loss, it was held that the time must be reckoned according to the longitude of the place where the contract was made and to be performed, and consequently that plaintiff was entitled to recover. *Walker v. Insurance Co.*, 29 Me. 317.

In the absence of statutory provision, the presumption is that the parties contracted with reference to solar time, and, where either party claims that the intention was to contract with reference to standard railroad time, the burden of proof is on him to show that. *Jones v. Insurance Co.*, 110 Iowa, 75, 81 N. W. 188, 46 L. R. A. 860.

³¹ *Thomson v. Insurance Co.*, 4 Pa. Dist. R. 382, 52 Leg. Int. 234.

³² *HAMMOND v. INSURANCE CO.*, 10 Gray (Mass.) 306; *Leigh v. Insurance Co.*, 26 La. Ann. 436. See, also, *Owen v. Insurance Co.*, 87 Ky. 571, 10 S. W. 119.

³³ *Leigh v. Insurance Co.*, 26 La. Ann. 436.

³⁴ *National Mut. Ben. Ass'n v. Miller*, 85 Ky. 88, 2 S. W. 900.

or before the day of maturity; but if the instructions of the insurer or the course of business between the parties have authorized the use of the mail or express service in making payment, mailing or expressing the amount of the premium on the day it falls due is a payment in time to prevent a forfeiture, even though it may be received after the date on which the policy requires its payment,³⁵ or not received at all.³⁶

Mode of Payment.

The premium is customarily payable in legal tender money,³⁷ and the insurer can decline to accept anything else in payment. But it is also competent and usual for the insurer to consent to receive in payment the check of the insured.³⁸ Likewise he may agree to receive the

³⁵ *Kendrick v. Insurance Co.*, 124 N. C. 315, 32 S. E. 723, 70 Am. St. Rep. 592; *Hollowell v. Insurance Co.*, 126 N. C. 398, 35 S. E. 616; *Whitley v. Insurance Co.*, 71 N. C. 480.

³⁶ *Kenyon v. Association*, 122 N. Y. 247, 25 N. E. 299; *Palmer v. Insurance Co.*, 84 N. Y. 63; *Currier v. Insurance Co.*, 53 N. H. 538.

Where the policy holders sent their renewal premiums by mail or express direct to the home office of the company, in another state, it was held that the express company or postal authorities were the agents of the policy holders, and not of the insurance company, so that the company would not have to pay a tax on receipts by them. *State v. Insurance Co.*, 106 Tenn. 282, 61 S. W. 75.

³⁷ Quite a number of cases have arisen since the Civil War as to the effect of payment in depreciated currency—e. g., notes issued by the Confederate States government—and it has been held that payment in such currency was sufficient. *Robinson v. Society*, 42 N. Y. 54, 1 Am. Rep. 490; *Sands v. Insurance Co.*, 50 N. Y. 626, 10 Am. Rep. 535; *New York Life Ins. Co. v. Clopton*, 7 Bush (Ky.) 179, 3 Am. Rep. 290. In the case first cited the court, per Hunt, J., said: "It is quite unreasonable to say that Cowardin [agent of New York company at Richmond, Va.] had no authority to receive the payment in Confederate money of the premiums due to the company, and that it was no better than counterfeit money. It was a currency issued by the authority of an existing, de facto government, which had adopted a constitutional form of government and was fully organized under it, which had in the field large armies, had won many battles, had invaded the states of the North, had besieged the national capital, was recognized as a belligerent power soon after by the British government, and which had from the outset been treated as a belligerent by the government of the United States, and which was itself confident of maintaining its existence. It is true that these are now valuable only as relics of a past existence. It was, however, nearly four years after the occurrences we are considering before this result became certain, and we cannot transport our knowledge backwards, and by its use condemn, as base and worthless, a currency which was then in general use and might have become permanently valuable."

³⁸ *Long v. Insurance Co.*, 137 Pa. 335, 20 Atl. 1014, 21 Am. St. Rep. 879; *Northwestern Life Assur. Co. v. Sturdivant*, 24 Tex. Civ. App. 331, 59 S. W. 61.

Where the policy was to take effect only upon payment of first premium, giving a worthless check was held not to be payment. *Brady v. Association*, 190 Pa. 595, 42 Atl. 962.

check of a third party,³⁹ a draft⁴⁰ or order⁴¹ drawn by the insured upon another person, the note of the insured or of another,⁴² or, in fact, any valuable property.⁴³ The insured may even be allowed to pay his premium by services rendered,⁴⁴ or a promise of services, as by advertising the business of the insurer.⁴⁵ The consent of the insurer to payment otherwise than in cash may be given expressly⁴⁶ by a properly authorized agent, or be implied from the insurer's course of business.⁴⁷ Thus, if the insurer has been accustomed to accept the check of the insured, or drafts upon third parties, in payment of previous premiums, a tender in good faith of such a check or draft will be sufficient to avoid a forfeiture. Likewise credit may always be given by an agent having competent authority.⁴⁸ Hence the note of the insured, when accepted by such an agent, will satisfy the condition of the policy requiring payment, even though payment in cash at the insurer's home office be stipulated for.⁴⁹ But the fact that the insurer has previously accepted the insured's note for premiums due does not give to the insured any right to demand that notes shall be accepted in payment of subsequent premiums.⁵⁰ The effect of nonpayment of such notes upon the

³⁹ *Union Central Life Ins. Co. v. Duvall* (Ky.) 46 S. W. 518.

⁴⁰ *Knickerbocker Life Ins. Co. v. Pendleton*, 112 U. S. 696, 5 Sup. Ct. 314, 28 L. Ed. 866.

⁴¹ *FIDELITY & CASUALTY CO. v. JOHNSON*, 72 Miss. 333, 17 South. 2, 30 L. R. A. 206; *Eury v. Insurance Co.*, 89 Tenn. 427, 14 S. W. 929, 10 L. R. A. 534; *Pacific Mut. Life Ins. Co. v. Williams*, 79 Tex. 633, 15 S. W. 478; *Cotten v. Casualty Co. (C. C.)* 41 Fed. 506; *Travelers' Life & Accident Ins. Co. v. Cash*, 14 Ind. App. 3, 42 N. E. 246; *Bane v. Insurance Co.*, 85 Ky. 677, 4 S. W. 787; *Lyon v. Insurance Co.*, 55 Mich. 141, 20 N. W. 829, 54 Am. Rep. 354. See, also, *Landis v. Insurance Co.*, 6 Ind. App. 502, 33 N. E. 989.

⁴² See *infra*, p. 209.

⁴³ It seems that an insurance agent may take property corresponding in amount to his commissions in payment of premium. *John Hancock Ins. Co. v. Schlink*, 175 Ill. 284, 51 N. E. 795. But otherwise he has ordinarily no power to receive property as payment. See *Hoffman v. Insurance Co.*, 92 U. S. 161, 23 L. Ed. 539; *Equitable Life Assur. Soc. v. Cole*, 13 Tex. Civ. App. 486, 35 S. W. 720.

⁴⁴ *Equitable Life Assur. Soc. v. Com.*, 67 S. W. 388, 23 Ky. Law Rep. 2359.

⁴⁵ *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96.

⁴⁶ *Tayloe v. Insurance Co.*, 9 How. (U. S.) 390, 13 L. Ed. 187.

⁴⁷ *Kenyon v. Association*, 122 N. Y. 247, 25 N. E. 299.

⁴⁸ *Franklin Fire Ins. Co. v. Colt*, 20 Wall. (U. S.) 560, 22 L. Ed. 423; *Sheldon v. Insurance Co.*, 25 Conn. 207, 65 Am. Dec. 565; *Church v. Insurance Co.*, 66 N. Y. 222; *Croft v. Insurance Co.*, 40 W. Va. 508, 21 S. E. 854, 52 Am. St. Rep. 902; *Baker v. Assurance Co.*, 162 Mass. 358, 38 N. E. 1124; *Pythian Life Ass'n v. Preston*, 47 Neb. 374, 66 N. W. 445.

⁴⁹ *National Life Ins. Co. v. Twiddell*, 58 S. W. 699, 22 Ky. Law Rep. 881; *Thompson v. Insurance Co.*, 104 U. S. 252, 26 L. Ed. 765; *Miller v. Insurance Co.*, 12 Wall. (U. S.) 285, 20 L. Ed. 398.

⁵⁰ See *supra*, page 190, and note; also, *infra*, chapter on "Waiver and Estoppel."

rights of the insured under the policy will be discussed in a later section.

Payment by Personal Arrangement between Insured and Agent of Insurer.

A great deal of confusion has crept into the decisions with reference to the effect of a personal arrangement made between the insured and the agent of the insurer for the payment of premiums due to the insurer whereby the insured pays no money which the agent may transmit to his principal, but gives his note to the agent individually, or cancels a debt due from the agent, or furnishes the agent goods for his personal use to the amount of the premium, while the agent assumes liability for the payment of the premium to his principal. Much of this confusion springs from a failure to distinguish cases that involve different principles of law, though somewhat similar in fact, and a consequent misleading use of precedents. For the purpose of simplifying the problem it will be well to state succinctly some well-settled principles that are applicable:

(1) An agent authorized merely to collect money due has presumptively authority to receive in payment only cash.

(2) An agent having general powers of contracting can make such arrangement for the payment of premiums as he sees fit, so long as it is not ultra vires of the insurer.

(3) An actual payment made to the insurer by any one on behalf of the insured will be valid if accepted.

(4) The insurer may always accept in payment of the premium the liability of a third party, and therefore, if the insurer debits the premium to the agent, and looks to him ultimately for payment, then, as between the insured and insurer, the premium is paid, and, as between the insured and the agent, such arrangement may be made for settling accounts as is convenient.

Applying these principles to the conditions most frequently found existing in the cases now under consideration, we reach the following conclusions:

The agent authorized by the insurer to collect premiums cannot accept in payment anything but cash. He cannot, for instance, accept in lieu of payment the promise of the insured to render certain services as medical examiner for the insurer,⁵¹ although a general agent might do so.⁵² So, plainly, an agent, even if possessed of general powers, could not bind the insurer by accepting a horse in payment of a premium.⁵³

⁵¹ *Carter v. Insurance Co.*, 56 Ga. 237.

⁵² See *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96, where a contract of this kind was entered into by the board of directors of the company.

⁵³ *Hoffman v. Insurance Co.*, 92 U. S. 161, 23 L. Ed. 539; *Equitable Life*

The acceptance of the note of a third party, or an order upon a debtor of the insured, would be clearly beyond the usual powers of a collecting agent, and would not bind the insurer unless consented to, when a novation would arise, the liability of such third party being taken in discharge of that of the insured. By parity of reasoning, the agent cannot accept in discharge of the premium debt owed to his principal a claim of the insured upon himself, unless the insurer accepts the liability of the agent thus tendered in payment, as he may do. Therefore it follows that a premium payment made by canceling a debt owed by the agent to the insured, or partly made by offsetting such a debt, is not binding upon the insurer.⁵⁴ As between the insured and the agent, the cancellation of the latter's debt is a good consideration for his promise to pay a premium due from the former, and the agent may be liable to the insured for his failure to perform his promise; but, as between the insured and insurer, it is difficult to see how the policy's requirement of cash payment is met by the mere promise of the insurer's agent to pay. A fortiori, payment by furnishing to the agent goods for his own personal use will not be sufficient to answer the requirements of the policy.⁵⁵

Many statements made in text-books and judicial opinions that appear to lay down a rule of law different from that above stated, to the effect that a premium may be validly paid by offsetting a debt owed by the agent, will be found upon close examination to involve some of the other principles stated above. Thus when the agent actually pays to the insurer, either by remittance or settlement of accounts, the premium due from the insured, certainly the insurer cannot, after accepting the money so paid, complain because the payment was induced by the insured's cancellation of a debt owed by the agent.⁵⁶ Likewise when an agent took the note of the insured for the amount of the premium, and out of the proceeds of the note, when discounted, paid over to the insurer that portion of the premium remaining after the reservation of the agent's commission, the insurer was estopped to claim that the premium had not been paid in cash as required by the policy.⁵⁷ In fact, it

Assur. Soc. v. Cole, 13 Tex. Civ. App. 486, 35 S. W. 720. But see *John Hancock Ins. Co. v. Schlink*, 175 Ill. 284, 51 N. E. 795.

⁵⁴ *Ostrander on Fire Ins.* § 94; *Tomsecek v. Insurance Co.*, 113 Wis. 114, 88 N. W. 1013, 57 L. R. A. 455, 90 Am. St. Rep. 846. This case examines the statement to the contrary in *May, Ins.* § 360, and shows that it is not supported by the authorities cited.

⁵⁵ *Hoffman v. Insurance Co.*, 92 U. S. 161, 23 L. Ed. 539; *Equitable Life Assur. Soc. v. Cole*, 13 Tex. Civ. App. 486, 35 S. W. 720. See, also, *Crawford County Mut. Ins. Co. v. Cochran*, 88 Pa. 230.

⁵⁶ *Home Ins. Co. v. Gilman*, 112 Ind. 14, 13 N. E. 121.

⁵⁷ In such cases the transaction amounts to a loan made by the agent, which is the consideration for the note given by the insured. Hence there is no failure of consideration that may be pleaded in defense of an action on

seems to be held without dissent that, so far as that part of the premium which the agent is entitled to retain in his settlement with the insurer is concerned, the agent may make such terms with the insured as he deems best for his own interest. He may accept for it goods or services, or, in the absence of anti-rebate statutes, he may forego the collection of part or all of it, and the premium must still be regarded as paid if the insurer has accepted the portion remitted.⁵⁸

So the course of business between the insurer and his agent may be such that the insurer looks for payment of the first premiums of all policies delivered to the agent through whom they have been negotiated, and not to the party insured; that is to say, the insurer charges up to such agents the first premiums of all policies applied for through them, and credits them with sums remitted at intervals or with policies returned, leaving them to make with the insured such agreements as to payments as may seem to them proper.⁵⁹ This acceptance of the liability of such agents, usually known as "insurance brokers," satisfies the condition of the policy requiring actual payment in cash as far as the insurer is concerned.⁶⁰

Another difficult question involving the validity of an irregular payment of premiums is well illustrated by *Woody v. Old Dominion Ins. Co.*,⁶¹ in which the opinion was delivered by the able and learned Judge Burks. Here the applicant's tender of the amount of the premium was refused by the agent of the insurer on the ground that the agent was indebted in that sum to the applicant for house rent, and that the two obligations should be allowed to offset each other. The insurer was also indebted to the agent for a sum equal to a part of the premium due. The insurer was held liable on this contract, although the policy provided that it should not go into effect until the actual payment of the premium, Judge Burks thus explaining the legal effect of the tender: ⁶² "If he had then paid over that amount to the appellant in discharge of the rent due, and the appellant had immediately handed it back to him

the note brought by the agent, when the insurance company has become insolvent after the execution of the note. See *Hudson v. Compere* (Tex. Sup.) 61 S. W. 389.

⁵⁸ *John Hancock Ins. Co. v. Schlink*, 175 Ill. 284, 51 N. E. 795. This view is seemingly held by the Supreme Court of the United States; *Hoffman v. Insurance Co.*, 92 U. S. 161, 23 L. Ed. 539.

⁵⁹ *Smith v. Society*, 65 Fed. 765, 13 C. C. A. 284.

⁶⁰ *Miller v. Insurance Co.*, 12 Wall. (U. S.) 285, 20 L. Ed. 398; *Wytheville Insurance & Banking Co. v. Telger*, 90 Va. 277, 18 S. E. 195; *Griffith v. Insurance Co.*, 101 Cal. 627, 36 Pac. 113, 40 Am. St. Rep. 96; *Western Assur. Co. v. McAlpin*, 23 Ind. App. 220, 55 N. E. 119, 77 Am. St. Rep. 423; *Train v. Insurance Co.*, 62 N. Y. 598.

But see *Brown v. Insurance Co.*, 59 N. H. 298, 47 Am. Rep. 205.

⁶¹ 31 Grat. (Va.) 362, 31 Am. Rep. 739.

⁶² 31 Grat. (Va.) at page 369, 31 Am. Rep. 739.

for the premium, nobody will doubt that the premium would have been actually paid. Did not the transaction which took place amount substantially to the same thing? The appellant took the money from his pocket and offered it to Rowzie, who declined to take it, saying in terms, 'I have in my hands money belonging to you for the rent, and will credit you by that amount.' It seems to me that it would be extremely technical to hold that this was not a payment, when, if instead of retaining the money, which he says he had in his hands, belonging to the appellant, he had paid it over to him with one hand and taken it back from him with the other, all will admit that there would have been payment. In the latter case the money paid would have become at once the money of the company in the hands of its agent, and so, I think, the money retained by the agent, under the arrangement made, became in like manner the money of the company, the greater part of which, in fact (\$9), was already in the hands of the company, for, according to Rowzie's statement (and it is not contradicted), the company owed him that amount, balance on account."

Many other cases take the same view,⁶³ but it is very doubtful whether the theory of the decision is correct. It would seem better to abide by the simple and righteous rule that the agent cannot be allowed to use the principal's money for the payment of his own debts.⁶⁴

Effect of Payment by Check, Note, etc.

Payment of a premium by check, draft, or note may be absolute or conditional. If absolute, the insurer accepts the liability of the parties bound upon the instrument received in satisfaction of the premium due.⁶⁵ If the instrument is not paid in accordance with its tenor, the insurer may enforce his rights thereunder, but cannot claim that the premium remains unpaid.⁶⁶ If, however, the instrument is received in conditional payment, as it is presumed to be unless otherwise agreed,⁶⁷ the nonpayment of the obligation remits the insurer to his original right to demand payment of the premium. He cannot, however, unless so expressly stipulated,⁶⁸ claim that the policy is forfeited for nonpayment of the premium. The premium has become a collectible debt, but the right of forfeiture was waived by the acceptance of the conditional payment.⁶⁹

⁶³ *Kerlin v. Association*, 8 Ind. App. 636, 35 N. E. 40; *Hallock v. Insurance Co.*, 26 N. J. Law, 268.

⁶⁴ *Ferebee v. Insurance Co.*, 68 N. C. 11.

⁶⁵ *National Ben. Ass'n v. Jackson*, 114 Ill. 533, 2 N. E. 414.

⁶⁶ *Michigan Mut. Life Ins. Co. v. Bowes*, 42 Mich. 19, 51 N. W. 962.

⁶⁷ *Clark, Cont.* 632; *National Life Ins. Co. v. Goble*, 51 Neb. 5, 70 N. W. 503; *McDonald v. Society*, 108 Wis. 213, 84 N. W. 154, 81 Am. St. Rep. 885.

⁶⁸ See *Knickerbocker Life Ins. Co. v. Pendleton*, 112 U. S. 696, 5 Sup. Ct. 314, 28 L. Ed. 866.

⁶⁹ *Hollowell v. Insurance Co.*, 126 N. C. 398, 35 S. E. 616.

There is difficulty in determining the effect of the dishonor of the check of the insured given in good faith and accepted by the insurer in payment of a premium due. It is clear that a receipt obtained by the delivery of the insured's check, known to be worthless, could be contradicted and the policy forfeited for nonpayment;⁷⁰ but it seems that when the insured gives his check in good faith, and it is accepted by the insurer without condition other than that implied by law, in payment of the premium due, the insurer cannot deny that the premium is paid, in so far as the validity of the policy is concerned.⁷¹ He may, however, make such denial in an action brought to recover the amount of the premium, or, in case of loss, to support his claim of set-off to the extent of the premium still unpaid.⁷²

As stated generally above, acceptance by the insurer of an order or draft drawn upon a third party by the insured is a payment of the premium so far as the validity of the policy is concerned, and the failure of the drawee to pay does not in any wise affect the liability of the insurer under the policy.⁷³ But it is not infrequently stipulated in the order or in the policy that a failure to pay the order or draft will forfeit or suspend rights under the policy, this being the usual practice among those engaged in industrial insurance. In the event of the nonpayment of such orders, the insurance is forfeited or suspended in accordance with the agreement of the parties, provided the insurer has made due demand and given to the insured notice of nonpayment.⁷⁴ But it has been held that no notice of nonpayment was necessary before forfeiture when the insured had left the employ of the drawee, and knew that the order would not be paid.⁷⁵ When an order so given is negotiable in form, the insurer occupies the position and sustains the responsibilities of any other holder of negotiable paper. He must make due presentment and demand, and, ordinarily, take all steps necessary to fix the liability of secondary parties. It has been held, however, that

⁷⁰ *Brady v. Association*, 190 Pa. 595, 42 Atl. 962.

⁷¹ See *Hollowell v. Insurance Co.*, 126 N. C. 398, 35 S. E. 616; *Northwestern Life Assur. Co. v. Sturdivant*, 24 Tex. Civ. App. 331, 59 S. W. 61; *Ætna Life Ins. Co. v. Greene*, 38 U. C. Q. B. 459. But see *Greenwich Ins. Co. v. Oregon Imp. Co.*, 76 Hun (N. Y.) 194, 27 N. Y. Supp. 794; *Id.*, 148 N. Y. 758, 43 N. E. 987 (memorandum decision).

⁷² *Hollowell v. Insurance Co.*, 126 N. C. 398, 35 S. E. 616. See, also, dicta in *Taylor v. Insurance Co.*, 9 How. (U. S.) 390, 13 L. Ed. 187.

⁷³ *National Ben. Ass'n v. Jackson*, 114 Ill. 533, 2 N. E. 414. See, also, *FIDELITY & CASUALTY CO. v. JOHNSON*, 72 Miss. 333, 17 South. 2, 30 L. R. A. 206; *Travelers' Life & Accident Ins. Co. v. Cash*, 14 Ind. App. 3, 42 N. E. 246; *Cotten v. Casualty Co. (C. C.)* 41 Fed. 506.

⁷⁴ *Lyon v. Insurance Co.*, 55 Mich. 141, 20 N. W. 829, 54 Am. Rep. 354; *Eury v. Insurance Co.*, 89 Tenn. 427, 14 S. W. 929, 10 L. R. A. 534. See, also, *Pacific Mut. Ins. Co. v. Williams*, 79 Tex. 633, 15 S. W. 478.

⁷⁵ *Bane v. Insurance Co.*, 85 Ky. 677, 4 S. W. 787; *Landis v. Insurance Co.*, 6 Ind. App. 502, 33 N. E. 989.

protest of a bill drawn by the insured, with a condition of forfeiture of the policy upon nonpayment, was not necessary to justify the insurer in declaring a forfeiture, although the court intimated that it would be otherwise if the bill were drawn by a stranger.⁷⁶ In the same case it was further held that dishonor of the bill by nonacceptance was not sufficient to work a forfeiture; presentment for payment was still necessary.

Application of Dividends to Premiums.

If the policy provides that dividends accruing on any policy shall be applied to the reduction of the premiums that become due thereon, the insured cannot be required to pay such premiums until he receives notice of the amount due in excess of the dividend credited to his policy.⁷⁷ Even when the insurer has not agreed in the policy to apply dividends to premiums due, it seems to be held that the insurer cannot declare a forfeiture of a policy for nonpayment of a premium when he has in his hands, as dividends on such policy, funds sufficient to pay the premium due;⁷⁸ and this is especially true when the insured has customarily applied previous dividends to the satisfaction of premium dues.⁷⁹ But the possession by the insurer of insufficient dividends will not prevent a forfeiture for nonpayment of a premium,⁸⁰ nor can the insured claim that the earnings of the insurer, not yet declared as dividends, shall be applied to a premium due.⁸¹

CONSEQUENCES OF NONPAYMENT OF PREMIUMS.

76. Nonpayment of the first premium, unless waived, prevents the inception of the policy. Nonpayment of subsequent premiums does not affect the validity of the contract, unless, by express stipulation of the policy, it is provided that the policy shall in that event lapse. The rights of the insured under a lapsed policy are determined by the terms of the policy, supplemented by any statutes applicable. The usual results are—

- (a) Forfeiture of all rights, or
- (b) Extension of insurance for a certain period, or
- (c) Granting paid-up insurance for a certain amount.

⁷⁶ *Knickerbocker Life Ins. Co. v. Pendleton*, 112 U. S. 696, 5 Sup. Ct. 314, 28 L. Ed. 866.

⁷⁷ *Meyer v. Insurance Co.*, 73 N. Y. 516, 29 Am. Rep. 200; *Eddy v. Insurance Co.*, 65 N. H. 27, 18 Atl. 89, 23 Am. St. Rep. 17; *Nall v. Society (Tenn. Ch.)* 54 S. W. 109; *Union Cent. Life Ins. Co. v. Caldwell*, 68 Ark. 505, 58 S. W. 355; *Phoenix Mut. Life Ins. Co. v. Doster*, 106 U. S. 30, 27 L. Ed. 65.

⁷⁸ See *Chicago Life Ins. Co. v. Warner*, 80 Ill. 410.

⁷⁹ *Girard Life Ins. Co. v. Mutual Life Ins. Co.*, 97 Pa. 15; *Manhattan Life Ins. Co. v. Smith*, 44 Ohio St. 156, 5 N. E. 417, 58 Am. Rep. 806.

⁸⁰ *Bulger v. Insurance Co.*, 63 Ga. 328.

⁸¹ *Mutual Life Ins. Co. v. Girard Life Ins., Annuity & Trust Co.*, 100 Pa. 172.

The effect of the failure of the applicant for insurance to pay the first premium has already been discussed, and need not be further treated here. As a general principle, the time specified for the payment of premiums is of the essence of the contract. The ability of the insurer to meet his obligations depends upon the prompt payment of all premiums due him, and without requiring payment of premiums ad diem the successful conduct of insurance business would be impossible. Yet so great is the disfavor in which the law holds forfeitures that it will not readily infer that the parties intend that the nonpayment of premiums shall be a condition of forfeiture; such intention must be clearly expressed, otherwise the unpaid premium will be regarded as a debt due from the insured to the insurer, who still remains liable under the policy.⁸²

But in response to the needs of their business, insurers are careful to include in their policies terms that will insure prompt payments of premiums and assessments due. The most potent mode of compelling payment in due time is to impose a penalty upon tardiness or neglect. Accordingly, a policy is seldom found that does not contain some penal provision for the enforcement of the insurer's premium claims.

The simplest penalty to be imposed is the absolute forfeiture of all of the insured's rights, and in the earlier policies we find this almost the only means used for the enforcement of punctual payment of premiums. But with the development of a more liberal spirit in the conduct of the insurance business, due largely to the growth of competition for public favor, the rigors of absolute forfeiture began to be abated. Insurers found it politic, as well as just, to give the policy holders the benefit of the reserve value of their policies at the time of default. Hence came the provisions for extended insurance for so long a time as the reserve value of the policy would suffice to pay the accruing premiums, or for paid-up insurance in such an amount as could be purchased by a sum equal to the value of the policy.

Any unreadiness that may have been shown by insurers to grant delinquent policy holders the equitable value of their policies in paid-up insurance has, in some states, been cured by statutes requiring the insurer to give the holder of a lapsed policy such insurance.⁸³

It is, of course, competent for the parties to make any other agree-

⁸² See dicta in *Ohio Farmers' Ins. Co. v. Stowman*, 16 Ind. App. 205, 44 N. E. 558, 940; *United States Life Ins. Co. v. Ross*, 159 Ill. 476, 42 N. E. 850; *Woodin v. Insurance Co.*, 52 N. C. 558; *American Ins. Co. v. Klink*, 65 Mo. 78; *Brady v. Insurance Co.*, 9 Misc. Rep. 6, 29 N. Y. Supp. 44.

⁸³ For the Missouri statute on this subject, and its construction, see interesting case, *Cravens v. Insurance Co.*, 148 Mo. 583, 50 S. W. 519, 53 L. R. A. 305, 71 Am. St. Rep. 628. For the construction of the New York statute of similar import, see *Nielsen v. Society*, 139 Cal. 332, 73 Pac. 163, 96 Am. St. Rep. 146.

ment desired as to the consequence of default on the part of the insured in the payment of premiums. The policy may stipulate that the rights of the insured shall be suspended during his delinquency, and provide for their revival, subject to certain conditions, upon the payment of the overdue premiums. Of course, the insurer is not liable for any loss that may be incurred during such a period of suspension. So the policy holder may, by the terms of his contract, be entitled to surrender his policy and receive a certain amount of cash, termed the "surrender value" of the policy. But, in the absence of express agreement therefor, a policy has no surrender value.⁸⁴

FORFEITURE.

77. A term providing for forfeiture upon nonpayment of premiums, while regarded with disfavor by the courts, will nevertheless be enforced, nor will equity relieve against such forfeiture unless fraud or mistake be shown.

Courts must enforce contracts as the parties make them, provided they are not contrary to law or public policy. Hence, when an insurance contract provides for forfeiture of the insured's rights upon certain contingencies, such provisions will be given full effect,⁸⁵ although the courts are acute in discovering grounds upon which such forfeitures may be avoided. Such forfeitures are not penalties, nor will equity relieve against them.⁸⁶ They are rather conditions that go to the heart of the contract, and their enforcement as parts of the agreement is necessary for the safe conduct of the business of insurance.

Forfeiture of Right to Paid-up Insurance—Void as a Penalty.

But it must be borne in mind that a mere penalty for the nonpayment of a debt will not be enforced. Hence, when the insurer makes a contract which is primarily a loan, and only incidentally pertains to insurance, he cannot expect to occupy a better position before the law than is accorded to other lenders.⁸⁷ Therefore, when the rights and liabilities of the parties to a contract of insurance have in some way become fixed, as where the insured has acquired the right to paid-up or extended insurance, and the insurer makes a loan to the insured secured

⁸⁴ *Haskell v. Society*, 181 Mass. 341, 63 N. E. 899.

⁸⁵ *Fowler v. Insurance Co.*, 116 N. Y. 389, 22 N. E. 576, 5 L. R. A. 805; *St. Louis Mut. Life Ins. Co. v. Grigsby*, 10 Bush (Ky.) 310.

⁸⁶ *KLEIN v. INSURANCE CO.*, 104 U. S. 88, 26 L. Ed. 662; *Thompson v. Insurance Co.*, 104 U. S. 252, 26 L. Ed. 766; *Attorney General v. Insurance Co.*, 93 N. Y. 70; *NEW YORK LIFE INS. CO. v. STATHAM*, 93 U. S. 24, 23 L. Ed. 789.

⁸⁷ *Mutual Ben. Life Ins. Co. v. First Nat. Bank (Ky.)* 74 S. W. 1066 [June, 1903].

by the policy, a stipulation in the policy forfeiting such insurance in case of nonpayment of principal or interest will, in some jurisdictions, not be enforced; it is a mere penalty. In accordance with this view it has been held that a stipulation in a policy that the failure to pay in advance the interest on any notes or loans owing to the insurer on account of annual premiums should avoid the policy was, so far as it applied to a paid-up policy, nothing else than a penalty to compel the prompt payment of debts otherwise well secured, and therefore unenforceable.⁸⁸ But to the rule thus stated there is much dissent.⁸⁹

The payment of part of the premium due will not prevent a forfeiture⁹⁰ unless accepted under such circumstances as will estop the in-

⁸⁸ *St. Louis Mut. Life Ins. Co. v. Grigsby*, 10 Bush (Ky.) 310.

In *Northwestern Mut. Life Ins. Co. v. Fort's Adm'r*, 82 Ky. 269, the court thus explains the doctrine set forth in the text: "Here the default, if any has occurred, is not of the substance of the contract, but in time of the payment of interest, and the company can be given all that it stipulated to receive. On the other hand, to forfeit the whole policy on account of default in time of payment of the interest, which formed but a small part of the consideration, and which the company is fully secured in the ultimate payment of, if not already paid, would impose upon the insured the entire loss of the premiums actually paid. A forfeiture under such circumstances would be extremely oppressive, and, if provided for in a contract between individuals concerning any ordinary business transaction, [would] be held as in the nature of a penalty. And, as we are unable to perceive any reason for changing or relaxing the rule in respect to contracts about the business of life insurance, the forfeiture provided for in this case must be likewise so held." See, also, *New York Life Ins. Co. v. Curry* (Ky.) 72 S. W. 736, 61 L. R. A. 268, holding that a provision in a contract of loan from an insurance company, for which its paid-up policy is pledged as collateral, that on default in payment of interest for 30 days the policy shall, at the company's option, be surrendered to it at the customary cash surrender value of policies of that class, is void.

Where there is no stipulation in the policy for forfeiture (see *Cowles v. Insurance Co.*, 63 N. H. 300; *Ohde v. Insurance Co.*, 40 Iowa, 357, 5 Bigelow, Ins. Cas. 145), or where the transaction is regarded by the parties to it as a loan (see *Bruce v. Insurance Co.*, 58 Vt. 253, 2 Atl. 710), it seems that a forfeiture for nonpayment of interest on premium notes will be held void, as a penalty. See, also, *Eddy v. Insurance Co.*, 65 N. H. 27, 18 Atl. 89, 23 Am. St. Rep. 17.

⁸⁹ By the probable weight of authority, a provision in a paid-up policy that it shall be forfeited for nonpayment in advance of interest on premium notes is held valid, and will not be relieved against in equity. *Holman v. Insurance Co.*, 54 Conn. 195, 6 Atl. 405, 1 Am. St. Rep. 97; *People v. Insurance Co.*, 103 N. Y. 480, 9 N. E. 35; *Fowler v. Insurance Co.*, 116 N. Y. 389, 22 N. E. 576, 5 L. R. A. 805. See, also, *Knickerbocker Life Ins. Co. v. Dietz*, 52 Md. 16; *Anderson v. Insurance Co.*, 1 Flap. 559, Fed. Cas. No. 362, 5 Bigelow, Ins. Cas. 527.

⁹⁰ *Willcutts v. Insurance Co.*, 81 Ind. 300; *Barnes v. Insurance Co.*, 74 N. C. 22, 5 Bigelow, Ins. Cas. 420.

suror to insist upon such forfeiture. So the failure to pay one of several installments of a premium note may, by the agreement of the parties, avoid the whole contract. In such a case a stipulation that all the installments shall be considered earned and payable, despite the forfeiture of the policy, is enforceable, not being contrary to public policy or unconscionable.⁹¹

Some question has arisen as to the effect of granting "days of grace," for the payment of a premium due, upon the insurer's right to declare the policy forfeited during the time of grace. Some of the English cases seem to hold that during such period the rights of the insured are suspended, and that, in case the sickness or death of the insured makes it expedient, the insurer may refuse a tender of the premium made before the expiration of the days of grace, and declare the policy void. Nearly all the American cases, on the other hand, hold that giving a period of grace amounts to postponing, until the expiration of such period, the insurer's right to enforce the forfeiture agreed upon. The conflict is only apparent. The courts have but to determine the intention of the parties, and to give effect thereto. If the days of grace are specified as a period within which a forfeited policy may be reinstated, provided the insured himself pays the premium,⁹² or provided the insurer elects to receive a premium tendered,⁹³ or upon any other conditions,⁹⁴ it is plain that the insurer could not be held liable for the death of the insured within the period of grace, unless all the conditions required for reinstatement had been satisfied. But where the agreement to give a period of grace for the payment of premiums amounts to an extension of time for payment, so that the insured is not in default until the expiration of that time, it is equally plain that the liability of the insurer continues through the whole period of grace, and such is the effect of the customary provision for grace in American policies.⁹⁵ Indeed, in many policies it is expressly stated that during the month of grace the unpaid premium shall remain an indebtedness, which, with interest, may be deducted from the amount to be paid under the policy in case of death during that month.

⁹¹ *St. Paul Fire & Marine Ins. Co. v. Coleman*, 6 Dak. 458, 43 N. W. 693, 6 L. R. A. 87; *Caufield v. Insurance Co.*, 47 Mich. 447, 11 N. W. 264.

⁹² *Simpson v. Insurance Co.*, 2 C. B. N. S. 257.

⁹³ *Salvin v. James*, 6 East, 571.

⁹⁴ Actual payment "before loss" required. *Bradley v. Insurance Co.*, 32 Md. 108, 3 Am. Rep. 121. Payment during "good health" of insured. *Want v. Blunt*, 12 East, 183; *Pritchard v. Society*, 3 C. B. N. S. 622.

⁹⁵ *McMaster v. Insurance Co.*, 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. 64; *Howell v. Insurance Co.*, 44 N. Y. 276, 4 Am. Rep. 675; *Homer v. Insurance Co.*, 67 N. Y. 478; *Farnum v. Insurance Co.*, 83 Cal. 246, 23 Pac. 869, 17 Am. St. Rep. 233; *Spoeri v. Insurance Co. (C. C.)* 39 Fed. 752.

Forfeiture when Annual Premium is Made Payable in Less than a Year.

An interesting and important question concerning forfeiture of policies for nonpayment of premiums has arisen out of the practice of insurers to date policies issued as of the same date with the application, which is also made the date for the payment of the recurring annual premiums, while the policy does not in fact take effect as a contract until delivery and payment of the first premium at a somewhat later date. The result is an inconsistency between the several terms of the contract. Upon payment of the first premium and delivery of the policy the insured is, under its terms, entitled to insurance for one year. Since the insurance begins only with the delivery of the policy, and not from the date written upon it, the year during which the insured is entitled to protection should begin on the day of delivery and extend to the same day in the succeeding year. Yet the policy also provides that if a premium falling due at a date, specified in the policy, earlier than the last day of the year stipulated for, shall remain unpaid, the policy shall be forfeited. Put briefly, the insurer by one term of his contract sells the insured protection for one year from a certain date, and then in another term declares the failure to pay a premium within that year will cut short the insurance bargained and paid for. One term insures for a whole year, another for part of a year. Applying the well-settled rule that in cases of uncertainty and repugnancy the court will always adopt that construction which will avoid a forfeiture, it seems safe to conclude that the insurer will not be allowed to declare the insurance forfeited before the expiration of a full year from the time when the policy became binding, even though the express terms of the contract may render it forfeitable upon failure to pay an annual premium at an earlier day.⁹⁶

⁹⁶ It seems that, although the insurer cannot forfeit the policy until the end of the term for which premiums have been paid, nevertheless a failure to pay the premium at the time specified will justify him in refusing to renew the insurance. Thus in *Tibbitts v. Insurance Co.*, 159 Ind. 671, 65 N. E. 1033, the policy, dated April 25th, was not issued until April 30th. The policy provided for the quarterly payment of premiums, the second of which was to be paid "July 25th at or before twelve o'clock m.," and, in case of failure to pay, the policy was to be forfeited. Payment was not made before noon on the 25th, and the insurer refused to receive it after that time. The insured died August 10th. It was claimed by the plaintiff that, inasmuch as the policy became effective only on delivery (30th), a tender of the premium at or before noon on July 30th was sufficient; but it was held that the failure to pay *ad diem* as specified in the policy justified the insurer in refusing to continue the policy. The question as to whether the risk was terminated on July 25th or 30th was not raised. It would seem in accordance with the principles stated in the text that, if the insured had died before July 30th, the insurer should have been held liable.

This conclusion appears to be justified by the case of *McMaster v. New York Life Ins. Co.*,⁹⁷ recently decided by the federal Supreme Court. In this case the insured, on December 26, 1893, received, and paid the first premium on, certain policies which bore date as of December 18, 1893, and which had been applied for on December 12th. The insured did not read the policies delivered, being assured by the agent that they conformed to his application. He did not, therefore, know that the policy provided that the annual premiums should be payable on December 12th of each year, and that a failure to pay any premium within a month after it became due would avoid the policy, the designation of that date being due to the fact that the agent of the insurer, without the knowledge or consent of the insured, inserted a request to that effect in the application. The insured paid no other premiums, and died on January 18, 1895. The insurer contended that the insured, having accepted the contract offered him, was estopped to deny that he had assented to all its terms; that by its terms the policy was forfeited on January 12, 1895, for nonpayment of the premium due on December 12, 1894; and this contention was supported by the judgments of both the Circuit Court and of the Circuit Court of Appeals. But in the Supreme Court it was held that the acceptance of the policy by the insured did not estop his representative to deny that he had requested the policy to be dated December 12th, since he had been induced thereto by the fraud of the agent of the insurer; that he had a right to suppose that he was insured for thirteen months from the time of the payment of the first premium; and that the insurance granted was not forfeitable within that period. Then, apparently assuming that the provision for payment on December 12th was a binding term of the contract, the court says: "To hold the insurance forfeitable for nonpayment of another premium within the year for which payment had already been fully made, would be to contradict the legal effect under the applications and policies of the first annual payment. Clearly, such a construction is uncalled for, if the words 'the 12th day of December in every year thereafter' could be assumed to mean in every year after the year for which the premiums had been paid. But, if not, taking all the provisions together, and granting that the words included December 12, 1894, nevertheless it would not follow that forfeiture could be availed of to cut short the thirteen months' immunity from December 18, 1893, as the premiums had already been paid up to December 18, 1894." The final conclusion of the court, that "the payment of the first year's premiums made the policies nonforfeitable for the period of thirteen months, and, inasmuch as the death of McMaster took place within that period, the alleged forfeiture furnished no defense to the action," seems to justify the inference, drawn above, that nonpayment of a pre-

⁹⁷ 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. 64.

mium, made payable by the policy within a year from the time when it became effective by the payment of the first annual premium, cannot cause a forfeiture of the policy before the expiration of the full year plus any period of grace allowed.⁹⁸

While conditions forfeiting the policies have repeatedly been designated "conditions subsequent,"⁹⁹ they are yet unlike such conditions of defeasance as are sometimes imposed on vested rights, such as interests in real estate. The happening of such a condition does not of itself defeat the estate upon which it is imposed; some affirmative act is necessary to enforce the forfeiture. But the condition of forfeiture in the contract of insurance is self-operative; upon breach of the condition the rights of the insured are terminated ipso facto.¹⁰⁰ No notice need be given by the insurer of his intention to claim the forfeiture.¹⁰¹

EXCUSES FOR NONPAYMENT.

78. No excuses for failure to pay premiums due can be alleged in order to prevent a forfeiture, save—

- (a) War, in some jurisdictions.
- (b) Insolvency of the insurer.
- (c) Refusal of tendered premium.
- (d) Any wrongful act of insurer preventing payment.
- (e) Want of notice, when it is the duty of the insurer to give notice.
- (f) Waiver of prompt payment.

In another respect the condition of forfeiture for nonpayment of premiums is strikingly unlike the usual condition subsequent. Impossibility of performance, not due to the default of the one under obligation to perform, will excuse the nonperformance of a condition subsequent; but even the act of God,¹⁰² rendering the payment of the pre-

⁹⁸ Of course, where policies take effect as of their date, delivery and payment of first premium not being required, failure to pay the annual premium upon the date specified will avoid the policy. *RUSE v. INSURANCE CO.*, 23 N. Y. 516.

⁹⁹ See *Thompson v. Insurance Co.*, 104 U. S. 252, 26 L. Ed. 765; *NEW YORK LIFE INS. CO. v. STATHAM*, 93 U. S. 24, 23 L. Ed. 789.

¹⁰⁰ *Attorney General v. Insurance Co.*, 93 N. Y. 70; *Ashbrook v. Insurance Co.*, 94 Mo. 72, 6 S. W. 462; *United States Life Ins. Co. v. Ross*, 159 Ill. 476, 42 N. E. 859; *Schimp v. Insurance Co.*, 124 Ill. 357, 16 N. E. 229.

¹⁰¹ *Attorney General v. Insurance Co.*, 93 N. Y. 70; *Roehner v. Insurance Co.*, 63 N. Y. 160.

¹⁰² The fact that at the time the payment was to be made the insured was sick and delirious is no excuse for nonpayment of premium. *Carpenter v. Association*, 68 Iowa, 453, 27 N. W. 456, 56 Am. Rep. 855. In this case the court said: "It is true, it was impossible for the assured at the time required therein to perform it; but he could have provided for its performance beforehand, and those of his family about him could have performed it for him. The fact that the plaintiff did not know of the existence of the pol-

mium wholly impossible, will not prevent the forfeiture of a policy when the premium remains unpaid. Thus the sickness or insanity of the insured, rendering him wholly incapable of attending to business, affords no excuse for a failure to pay premiums at the day.¹⁰³ Neither will the fact that the policy is in possession of the insurer as pledgee,¹⁰⁴ so that the insured mistakes the date on which premiums are payable, excuse a tardy payment.¹⁰⁵ In fact, no excuse whatever will avail to prevent a forfeiture in case premiums due remain unpaid, unless such nonpayment has in some way been induced by the condition, conduct, or default of the insurer. These may now be considered in detail.

War.

The outbreak of war between the countries in which the insurer and insured respectively reside renders it unlawful that premiums should be paid or any other business transacted between them. In accordance with the general principle stated above, the impossibility of lawfully paying the premiums falling due during the war will not excuse their nonpayment nor prevent a forfeiture. And such is the better view,¹⁰⁶ although it is properly held by the Supreme Court of the United States that the insurer must pay to the insured the equitable value of his policy at the outbreak of the war.¹⁰⁷ The majority of the courts passing on this question have, however, in opposition to sound principle as it would seem, held that the existence of war suspends the contract, and thus prevents forfeiture for nonpayment of premiums that would oth-

erwise be payable. In *Prudence and care* before her husband's death does not change the case. Prudence and care on the part of the assured would have prompted him to prepare for the payment of the assessment upon the day it became due, and to inform his wife of his contract, and his obligation to perform it at the time prescribed."

See, also, cases cited in following note; but see *Hillyard v. Insurance Co.*, 35 N. J. Law, 415; *Grand Lodge A. O. U. W. v. Brand*, 29 Neb. 644, 46 N. W. 95.

¹⁰³ *Thompson v. Insurance Co.*, 104 U. S. 252, 26 L. Ed. 765; *KLEIN v. INSURANCE CO.*, 104 U. S. 88, 26 L. Ed. 662; *Howell v. Insurance Co.*, 44 N. Y. 277, 4 Am. Rep. 675; *WHEELER v. INSURANCE CO.*, 82 N. Y. 543, 37 Am. Rep. 594; *Home Ins. Co. v. Wood*, 72 S. W. 15, 24 Ky. Law Rep. 1638. The same rule applies to the payment of assessments in benevolent societies.

Hawkshaw v. Supreme Lodge (C. C.) 29 Fed. 770.

¹⁰⁴ *Howard v. Insurance Co.*, 6 Mo. App. 577.

¹⁰⁵ Nor will insured's absence from home excuse nonpayment. *Webb v. Insurance Co.*, 63 Md. 217; *Greeley v. Insurance Co.*, 50 Iowa, 86.

¹⁰⁶ *NEW YORK LIFE INS. CO. v. STATHAM*, 93 U. S. 24, 23 L. Ed. 789; *New York Life Ins. Co. v. Davis*, 95 U. S. 425, 24 L. Ed. 453; *Abell v. Insurance Co.*, 18 W. Va. 400; *Worthington v. Insurance Co.*, 41 Conn. 372, 19 Am. Rep. 495; *Dillard v. Insurance Co.*, 44 Ga. 119, 9 Am. Rep. 167. See, also, *supra*, p. 94.

¹⁰⁷ *NEW YORK LIFE INS. CO. v. STATHAM*, 93 U. S. 24, 23 L. Ed. 789. See, also, *Abell v. Insurance Co.*, 18 W. Va. 400.

erwise have become due. According to this view, the suspended premiums become payable upon the restoration of peace, and a tender then of such premiums will revive the policy.¹⁰⁸

Insolvency of the Insurer.

If the insurer has become insolvent and has suspended business, the insured is not compelled to pay a premium that has fallen due, in order to preserve his right to claim the value of his policy in such proceedings as may be taken for winding up the business of the insolvent.¹⁰⁹ But the mere fact that the insurer is in an insolvent condition will not excuse failure to pay premiums due, if the insurer's business is not yet suspended.¹¹⁰

Refusal of Tendered Premium.

The act of the insurer or his agent in refusing the tender of a premium properly made will necessarily estop the insurer from claiming a forfeiture for nonpayment. The tender must be valid, and comply in all respects with the requirements of the policy.¹¹¹ So nonpayment was excused where the agent of the insurer declined to accept the premium tendered because the receipts needed had not been received from the home office.¹¹² A like rule applies if a tender has been declined on the ground that the policy is already forfeited.¹¹³ Even the tender is

¹⁰⁸ *Cohen v. Insurance Co.*, 50 N. Y. 610, 10 Am. Rep. 522; *Sands v. Insurance Co.*, 50 N. Y. 626, 10 Am. Rep. 535; *Robinson v. Society*, 42 N. Y. 54, 1 Am. Rep. 490; *Mutual Ben. Life Ins. Co. v. Hillyard*, 37 N. J. Law, 444, 18 Am. Rep. 741; *Clemmitt v. Insurance Co.*, 76 Va. 355; *Mutual Benefit Life Ins. Co. v. Atwood's Adm'r*, 24 Grat. (Va.) 497, 18 Am. Rep. 652; *New York Life Ins. Co. v. Hendren*, 24 Grat. (Va.) 536; *Manhattan Life Ins. Co. v. Warwick*, 20 Grat. (Va.) 614, 3 Am. Rep. 218; *New York Life Ins. Co. v. Clopton*, 7 Bush (Ky.) 179, 3 Am. Rep. 290; *Statham v. Insurance Co.*, 45 Miss. 581, 7 Am. Rep. 737.

In case of the death of the insured pending the war, no tender is necessary. *Connecticut Mut. Life Ins. Co. v. Duerson's Ex'r*, 28 Grat. (Va.) 630; *Martine v. Society*, 53 N. Y. 339, 13 Am. Rep. 529.

¹⁰⁹ *Burdon v. Association*, 147 Mass. 360, 17 N. E. 874, 1 L. R. A. 146; *Attorney General v. Insurance Co.*, 82 N. Y. 336; *Jones v. Life Ass'n*, 83 Ky. 75, 7 Ky. Law Rep. 1; *Jones v. Benefit Ass'n (Ky.)* 2 S. W. 447; *People v. Insurance Co.*, 92 N. Y. 105.

¹¹⁰ *Taylor v. Insurance Co.*, 9 Daly (N. Y.) 489; *Benton v. Insurance Co.* [1897] 34 Scottish L. R. 686.

¹¹¹ *Meyer v. Insurance Co.*, 73 N. Y. 516, 29 Am. Rep. 200; *Continental Ins. Co. v. Miller*, 4 Ind. App. 553, 30 N. E. 718.

¹¹² *Kantrener v. Insurance Co.*, 5 Mo. App. 581; *Shear v. Insurance Co.*, 4 Hun (N. Y.) 800.

But the fact that the agent has no such receipt will not excuse payment or tender. *Morey v. Insurance Co.*, 2 Woods, 663, Fed. Cas. No. 9,795.

¹¹³ *Travelers' Ins. Co. v. Pulling*, 159 Ill. 603, 43 N. E. 762.

In *Evans v. Insurance Co.*, 64 N. Y. 304, there was a stipulation in the policy avoiding it in case the insured should reside in the South. On the day the annual premium became due, an agent of the insured called at de-

excused if the insurer has clearly repudiated the contract before the premium became due,¹¹⁴ and the refusal of one premium tendered renders unnecessary further tenders of subsequently accruing premiums.¹¹⁵

Payment Prevented by Wrongful Act of the Insurer.

It would be manifestly unjust to allow the insurer to claim a forfeiture for nonpayment of a premium due when the insured's failure to pay was due to the wrongful conduct of the insurer. Therefore, when the insurer secures the surrender of a life policy without the knowledge or consent of the beneficiary, the rights of the latter cannot be forfeited on account of the nonpayment of subsequent premiums.¹¹⁶ So the insurer is estopped in any case to claim a forfeiture when a surrender of the policy has been procured by misconduct.¹¹⁷ Thus, in *Heinlein v. Imperial Life Ins. Co.*,¹¹⁸ the agents of the insurer induced the beneficiary under a policy to surrender it for cancellation by falsely representing that the insurance was illegal and void, and returning the

defendant's office to pay it. The defendant declined to receive it, because the insured was residing South, unless a percentage on the amount insured was paid in addition, but agreed with the agent to continue the policy and give credit for the amount claimed until the next day. On the next day the insured's agent, having been authorized by his principal to pay the increased rate, tendered the required amount to the insurance company, who refused to receive it. It was held that as there was no agreement to pay, binding upon the insured, the promise of the defendant was without consideration, and therefore not binding.

¹¹⁴ *Manhattan Life Ins. Co. v. Smith*, 44 Ohio St. 156, 5 N. E. 417, 58 Am. Rep. 806; *Girard Life Ins. Co. v. Mutual Life Ins. Co.*, 86 Pa. 236; *Hayner v. Insurance Co.*, 69 N. Y. 435. See, also, *Heinlein v. Insurance Co.*, 101 Mich. 250, 59 N. W. 615, 25 L. R. A. 627, 45 Am. St. Rep. 409.

¹¹⁵ *Meyer v. Insurance Co.*, 73 N. Y. 516, 29 Am. Rep. 200; *Shaw v. Insurance Co.*, 69 N. Y. 286; *National Mut. Ins. Co. v. Home Benefit Society*, 181 Pa. 443, 37 Atl. 519, 59 Am. St. Rep. 666.

¹¹⁶ *Whitehead v. Insurance Co.*, 102 N. Y. 143, 6 N. E. 267, 55 Am. Rep. 787; *Garner v. Insurance Co.*, 110 N. Y. 266, 18 N. E. 130, 1 L. R. A. 256; *Manhattan Life Ins. Co. v. Smith*, 44 Ohio, 156, 5 N. E. 417, 58 Am. Rep. 806; *Mutual Ben. Life Ins. Co. v. Dunn*, 106 Ky. 591, 51 S. W. 20.

But see *Miles v. Insurance Co.*, 147 U. S. 177, 13 Sup. Ct. 275, 37 L. Ed. 128, distinguishable on the ground of the insurer's good faith; *SCHNEIDER v. INSURANCE CO.*, 123 N. Y. 109, 25 N. E. 321, 20 Am. St. Rep. 727.

¹¹⁷ Where the insured surrendered his policy because of a mistake as to the amount of the paid-up policy that he was to receive, and with a distinct understanding between him and the agent of the company that he was to receive a new policy corresponding to such mistaken view, and the company kept the policy for six months without giving the insured any notice of the mistake, and then, by indorsement on the policy, attempted to reduce it to a different amount, the insured was in no default, and did not forfeit his rights under the policy. *Lovell v. Insurance Co.*, 111 U. S. 264, 4 Sup. Ct. 390, 28 L. Ed. 423.

¹¹⁸ 101 Mich. 250, 59 N. W. 615, 25 L. R. A. 627, 45 Am. St. Rep. 409.

premiums paid. A premium accruing before the death of the insured was not paid. But it was held that a court of equity should decree a revival of the policy despite the surrender and nonpayment of the premium.

It is well recognized that, as between parties bearing no fiduciary relation towards each other, neither a mistake nor an innocent misrepresentation as to the law governing a contract will afford any reason for relieving the parties from the full legal consequences of their acts. But a different rule has been applied to such misrepresentations, made by an insurer, as to the legal effect of the contract made with the insured. Thus, in a case decided by the Supreme Court of Minnesota,¹¹⁹ the insured was made to believe by the representations of the insurer that an illegal assessment was valid, and payable on penalty of forfeiture. Rather than submit to the imposition of such assessments, the insured declined to pay certain premiums legally due, and thus allowed his policy to lapse. Upon the death of the insured it was held that, since the misrepresentations of the insurer had caused the nonpayment of the premiums and the consequent lapse of the policy, the insurer could not set up a forfeiture in defense of an action by the beneficiary, who was entitled to recover the amount of the policy less the premiums unpaid. This holding was based on the theory that there existed a quasi fiduciary relation between the parties. The correctness of the decision is, to say the least, doubtful.

Want of Notice, and Waiver.

The insurer cannot claim a forfeiture for nonpayment of a premium when he was under obligation to give the insured notice that such premium would become due, and had failed to do so. The question of when the duty of giving such notice rests upon the insurer is discussed in the following section. So, when the insurer has in any wise waived his right to demand payment *ad diem*,¹²⁰ he will be estopped to claim a forfeiture for nonpayment. This is but a phase of the general subject of waiver and estoppel, and will be reserved for treatment in the chapter on that subject.

¹¹⁹ Colby v. Investment Co., 57 Minn. 510, 59 N. W. 539.

¹²⁰ "Any agreement, declaration, or course of action on the part of an insurance company which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract." *Aetna Life Ins. Co. v. Ragsdale's Adm'r*, 95 Va. 579, at page 582, 29 S. E. 328, at page 329, citing *New York Life Ins. Co. v. Eggleston*, 96 U. S. 572, 24 L. Ed. 841.

NOTICE OF PREMIUMS DUE.

79. IN GENERAL—No obligation rests upon the insurer to notify the insured of the time when a premium falls due, unless such notice be required by statutory enactment or by agreement of the parties.

80. STATUTORY PROVISIONS—In many states statutes have been passed prohibiting forfeiture of life policies for nonpayment of premiums, unless the insurer shall have given notice, a specified time in advance, of the time when the premiums would become due, or of default in the payment of premiums already due. All the requirements of such statutes must be strictly complied with by the insurer before he can set up a forfeiture.

The insured, by accepting a policy containing a condition of forfeiture, agrees that his rights thereunder shall terminate if he fails to pay the specified premium at the times therein designated. Under such circumstances there cannot rest upon the insurer any legal obligation to be the keeper of the insured's interest by giving him notice of the arrival of the agreed time of payment, or by otherwise aiding him to perform his part of the agreement.¹²¹ But the insurer may give notice, and usually does so. This he may do, without the spur of legal obligation, through semibenevolence and business expediency; or the notice may be given under the requirements of law. Such a legal obligation to give notice may arise from peculiar provisions in the policy, or from the requirements of statutes.

Notice Required by Policy—Where Dividends are Applied to Premium.

It is manifest that the insured cannot be required to pay a premium until he has knowledge of the amount of such premium. Therefore, when the policy stipulates that all dividends apportioned to such policy shall be applied in payment of premiums due thereon, the insured cannot be in default for nonpayment until he has notice of the balance due.¹²²

¹²¹ *Thompson v. Insurance Co.*, 104 U. S. 252, 26 L. Ed. 765. Punctuality in the payment of premiums is of the very essence of the contract, and, where payment is not made at the time, the company has the right to forfeit, if such was the contract. *Holly v. Insurance Co.*, 105 N. Y. 437, 11 N. E. 507; *Continental Ins. Co. v. Dorman*, 125 Ind. 189, 25 N. E. 213.

¹²² *Phoenix Mut. Life Ins. Co. v. Doster*, 106 U. S. 30, 27 L. Ed. 65; *Meyer v. Insurance Co.*, 73 N. Y. 516, 29 Am. Rep. 200; *Nall v. Society (Tenn. Ch. App.)* 54 S. W. 109; *Union Cent. Life Ins. Co. v. Caldwell*, 68 Ark. 505, 58 S. W. 355.

Where an insurance company has been accustomed to inform the insured of the place where, and the agent to whom, he should make payment of each premium as it fell due, the insured has a right to rely on receiving the usual notice, and a nonpayment of a premium will not avoid the policy, in case the agency at which payment had been previously made has been discontinued.

Same—Stipulations in the Policy—Usage.

Likewise the insurer may agree to give notice of the maturity of premiums. Such an agreement may be expressly made in the policy itself, or in the insurer's charter or by-laws, or it may be made, expressly or impliedly, after the issue of the policy. Such express agreements give rise to little difficulty. The bad standing of all forfeitures in courts of justice throws upon the insurer the burden of proving actual notice¹²³ given to the insured, and it is a question for the jury whether the notice is sufficient.¹²⁴

But much difficulty is found in determining when an agreement to give notice can be implied from the conduct of the parties; that is, when the insured is entitled to rely upon the custom or usage of the insurer to give notice. The usage relied on may be (1) a general usage among insurers, or (2) a general course of business adopted by the particular insurer towards all his policy holders, or (3) the customary course of business between the insurer and the particular party insured, whose rights are in question. It is manifest, and well settled, that to admit evidence of usage in the first two cases would be to add, by parol, terms to a written contract, which cannot be done. In the third case, however, the acts shown are subsequent to the written contract, and may properly be shown in evidence as tending to prove a subsequent agree-

ued and the company has neglected to inform the policy holder where and to whom the premium should be paid. *New York Life Ins. Co. v. Eggleston*, 96 U. S. 572, 24 L. Ed. 841.

¹²³ *Columbia Ins. Co. v. Buckley*, 83 Pa. 298; *Supreme Lodge Knights of Honor v. Dalberg*, 138 Ill. 508, 28 N. E. 785. Where, under the terms of the contract, the insurer must notify the insured of his liability for any dues, premium, or assessment, if such notice is sent by mail it is incumbent upon the insurer to show not only that the notice was properly addressed and mailed, but also that it was actually received. *Castner v. Insurance Co.*, 50 Mich. 273, 15 N. W. 452; *Schmidt v. Insurance Co.*, 4 Ind. App. 340, 30 N. E. 939; *McCorkle v. Association*, 71 Tex. 149, 8 S. W. 516.

Where a letter properly addressed is mailed, there is a prima facie presumption that it reached its destination. If its receipt is denied, however, it is for the jury to determine the weight of this presumption. *Rosenthal v. Walker*, 111 U. S. 185, 4 Sup. Ct. 382, 28 L. Ed. 395; *Meyer v. Krohn*, 114 Ill. 574, 2 N. E. 495. It has been held that where the receipt of the letter is denied, it is reversible error to instruct the jury that there is a prima facie presumption that it was received. *Home Ins. Co. v. Marple*, 1 Ind. App. 411, 27 N. E. 633.

The terms of the contract, itself, or the provisions of a statute governing the subject, must in all cases be looked to, to determine the sufficiency of the notice given. The requirements of the contract or the statute may be satisfied by the proper mailing of the notice alone. *Survick v. Association (Va.)* 23 S. E. 223; *McKenna v. Insurance Co.*, 73 Iowa, 453, 35 N. W. 519.

As to when notice by publication is sufficient under a clause of the charter, see *Pennsylvania Training School v. Independent Mut. Fire Ins. Co.*, 127 Pa. 559, 18 Atl. 392.

¹²⁴ *Columbia Ins. Co. v. Buckley*, 83 Pa. 293, 24 Am. Rep. 172.

ment upon the part of the insurer to give notice. And while there is weighty authority to the contrary, it seems to be generally held that such a custom on the part of the insurer is alone sufficient to raise such an implied agreement, and to prevent a forfeiture without notice.¹²⁵

Statutory Notice.

Where the subject of notice is governed by statute, the statute forms a part of every contract of insurance made within that jurisdiction or with reference to its laws, and governs the rights and obligations of the parties in like manner as if all of its terms and conditions had been incorporated in the written agreement. The provisions of the statute must be strictly complied with, both as to the form of the notice and the time and manner of giving it.¹²⁶ It is held that:

(1) If the statute does not prescribe what kind of notice shall be given, personal notice is necessary.

(2) If notice by mail is declared sufficient, the requirements of the statute are satisfied when the notice is properly addressed and mailed, though it fails to reach the insured.¹²⁷

While statutory enactments requiring notice are for the benefit of the insured, it is nevertheless held that it would be contrary to public policy to allow him to waive the benefit of them. Any such waiver is "ultra vires and void."¹²⁸ The insured may, however, voluntarily elect to terminate the contract, and by doing so he necessarily forfeits

¹²⁵ *MAYER v. INSURANCE CO.*, 38 Iowa, 304, 18 Am. Rep. 34; *Helme v. Insurance Co.*, 61 Pa. 107, 100 Am. Dec. 621; *Grant v. Insurance Co.*, 76 Ga. 583; *Union Cent. Life Ins. Co. v. Pottker*, 33 Ohio St. 459, 31 Am. Rep. 555; *Hartford Ins. Co. v. Hyde*, 101 Tenn. 396, 48 S. W. 968.

Contra, *Thompson v. Insurance Co.*, 104 U. S. 252, 26 L. Ed. 765; *Girard Life Ins., Annuity & Trust Co. v. Mutual Life Ins. Co.*, 97 Pa. 15.

¹²⁶ *Carter v. Insurance Co.*, 110 N. Y. 15, 17 N. E. 396; *Baxter v. Insurance Co.*, 119 N. Y. 450, 23 N. E. 1048, 7 L. R. A. 293. The phraseology of the notice given must be as clear as the statute. *Phelan v. Insurance Co.*, 113 N. Y. 147, 20 N. E. 827, 10 Am. St. Rep. 441. See *Mutual Life Ins. Co. v. Phinney*, 178 U. S. 327, 20 Sup. Ct. 906, 44 L. Ed. 1088, for the New York statute in full.

¹²⁷ *McConnell v. Society*, 92 Fed. 769, 34 C. C. A. 663.

As to computing time under the New York statute prohibiting the forfeiture of a policy unless the insured fails to make payment within 30 days after the receipt of notice, see *Hicks v. Insurance Co.*, 60 Fed. 690, 9 C. C. A. 215; *Rosenplanter v. Society*, 96 Fed. 721, 37 C. C. A. 566, 46 L. R. A. 473; *Wachtel v. Society*, 84 N. Y. 28, 38 Am. Rep. 478; *Schmidt v. Insurance Co.*, 4 Ind. App. 340, 30 N. E. 939; *McKenna v. Insurance Co.*, 73 Iowa, 453, 35 N. W. 519.

¹²⁸ *Griffith v. Insurance Co.*, 101 Cal. 627, 36 Pac. 113, 40 Am. St. Rep. 96; *Equitable Life Assur. Soc. v. Nixon*, 81 Fed. 796, 26 C. C. A. 620; *Hill v. Insurance Co. (C. C.)* 113 Fed. 44, affirmed *Mutual Life Ins. Co. v. Hill*, 118 Fed. 708, 55 C. C. A. 536.

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all statutory rights to which he was entitled while the contract was in force.¹²⁰

An important question has arisen as to whether a statute requiring notice, enacted by the state in which an insurance corporation is chartered and has its domicile, forms a part of its contracts made with parties resident in other states. Plainly the terms of the policy may incorporate therein the laws of the insurer's state, or it may be made subject to the laws of such state if it is to be there performed. But where the contract is made and to be performed in the state where the insured resides, and there is no reference in the policy to the law of any state as governing the contract, it has recently been held by the Supreme Court of the United States that the law of the insurer's residence and incorporation, requiring notice, does not form any part of the contract, and that the rights of the parties are governed by the law of the place where the contract was made, which is always presumed to be the law of the contract.¹²¹ Many state courts, however, appear to have held differently.¹²²

To whom Notice should be Given.

Where the insurer is required, either by reason of agreement or statute, to give notice of the time when premiums fall due, notice should be given either to the insured, or to his assignee, who has assumed all obligations under the contract, with the consent of the insurer.¹²³

Where the insured is physically or mentally incapacitated from attending to business, notice should be given to the beneficiary before the policy is claimed to be forfeited for a failure on the part of the insured to pay any premium which may be due, provided that the insurer has been duly notified of this disability.¹²⁴

¹²⁰ *Mutual Life Ins. Co. v. Phinney*, 178 U. S. 327, 20 Sup. Ct. 906, 44 L. Ed. 1088; *Mutual Life Ins. Co. v. Sears*, 178 U. S. 345, 20 Sup. Ct. 912, 44 L. Ed. 1096. But see *Washington Life Ins. Co. v. Berwald* (Tex. Civ. App.) 72 S. W. 436.

¹²¹ *Mutual Life Ins. Co. v. Cohen*, 179 U. S. 262, 21 Sup. Ct. 106, 45 L. Ed. 181. See, also, *Mutual Life Ins. Co. v. Hill*, 193 U. S. 551, 24 Sup. Ct. 538, 48 L. Ed. 788, in which the provisions of the New York law requiring notice, which were incorporated in the policy issued to a resident of Washington, were held to be validly waived by another term of the policy.

¹²² *McConnell v. Society*, 92 Fed. 769, 34 C. C. A. 663; *Nall v. Society* (Tenn. Ch. App.) 54 S. W. 109; *Equitable Life Assur. Soc. v. Nixon*, 81 Fed. 796, 26 C. C. A. 620; *Mutual Life Ins. Co. v. Hill*, 97 Fed. 263, 38 C. C. A. 159, 49 L. R. A. 127. See article in 52 Cent. Law J. p. 4.

¹²³ *Brannin v. Insurance Co.*, 28 N. J. Law, 92. A voluntary assignee is a stranger to the contract, and therefore not entitled to notice. *Lycoming Fire Ins. Co. v. Storrs*, 97 Pa. 354.

¹²⁴ *Buchanan v. Supreme Conclave*, 178 Pa. 465, 35 Atl. 873, 34 L. R. A. 436, 56 Am. St. Rep. 774.

PAID-UP POLICIES AND EXTENDED INSURANCE.

81. Among the most important provisions of the so-called "nonforfeitable" policies are those granting the delinquent policy holder paid-up and extended insurance. The rights of the parties under such provisions necessarily depend upon the terms of the agreement as written, but these general principles may be stated:

- (a) Ambiguities will be resolved in favor of the insured.
- (b) The parties will be presumed to have continued the original contract, so far as its terms are applicable to the new agreement.
- (c) All conditions precedent to the right to demand such paid-up or extended insurance must be strictly complied with, unless contrary to law.
- (d) The time specified within which a delinquent policy shall be surrendered for commutation is of the essence of the contract. A delay beyond that time will be fatal to the rights of the insured. There is, however, much authority opposed to this proposition.

Definitions.

By "paid-up" insurance is meant a unilateral contract, executory as to the insurer, but wholly executed as to the insured. The insurer promises to pay in accordance with the terms of the contract, without further payments of premiums by the insured. The consideration for the insurance may have been given in the form of a single premium, or of a series of premiums already paid.

Extended insurance, called also "term" and "temporary" insurance, is the extension of the policy in its original amount for so long a period as the value of the policy at the time of default will suffice to pay the present worth of all the premiums that would accrue within that period.¹²⁵ The amount of paid-up insurance to which the insured is en-

¹²⁵ The rule is thus laid down in Rev. St. Mo. 1879, § 5983: "Policies nonforfeitable, when. No policy of insurance on life hereafter issued by any life insurance company authorized to do business in this state, on and after the first day of August, A. D. 1879, shall, after payment upon it of two full annual premiums, be forfeited or become void by reason of the nonpayment of premiums thereon, but it shall be subject to the following rules of commutation, to wit: The net value of the policy, when the premium becomes due and is not paid, shall be computed upon the American experience table of mortality, with four and one-half per cent. interest per annum, and after deducting from three-fourths of such net value any notes or other indebtedness to the company, given on account of past premium payments on said policy issued to the insured, which indebtedness shall then be canceled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy, and the term for which such temporary insurance shall be in force shall be determined by the age of the person whose life is insured at the time of default of premium, and the assumption of mortality and interest aforesaid; but, if the policy shall be an endow-

titled in any case is also usually determined by the reserve value of the policy, which is regarded as a single premium paid at the time of default in consideration of the insurer's promise to pay a certain sum upon the happening of the event upon which it is contingent. Sometimes, however, the amount of paid-up insurance given is made equal to the sum of all the premiums paid, or a certain part of the sum written in the original policy, proportioned to the number of premiums paid. Both paid-up and extended insurance are usually conditioned upon the payment of certain initial premiums, ordinarily two or three.

Sources of the Right.

As shown above, the delinquent policy holder has no inherent right to the reserve value of his policy. The right of the insurer to enforce an agreement of forfeiture is unquestionable. Hence any claim made by the insured to paid-up or extended insurance must necessarily be based upon an agreement or a statute according to him such a right. It follows that the defaulting policy holder's claim must be brought within the terms of such agreement or statute before it can be enforced.¹⁸⁵ The nonforfeiture features of different policies are so dissimilar in both effect and phraseology that few rules of construction of general application can be deduced from the numerous cases that clutter the books, the decision in each case turning upon the peculiar wording of the policy in suit. It will be well, however, to state a few principles that are of value in determining the proper construction of all such nonforfeiture agreements, however dissimilar in form or wording.

ment, payable at a certain time or at death, if it should occur previously, then, if what remains, as aforesaid, shall exceed the net single premium of temporary insurance for the remainder of the endowment term for the full amount of the policy, such excess shall be considered as a net single premium for a pure endowment of so much as such premium will purchase, determined by the age of the insured at date of defaulting the payment of the premium on the original policy, and the table of mortality and interest as aforesaid, which amount shall be paid at the end of the original term of endowment, if the insured shall then be alive." For the method of determining the amount of paid-up policy, see *Id.* § 5984. These statutes are set forth and construed in *Cravens v. Insurance Co.*, 148 Mo. 583, 50 S. W. 519, 53 L. R. A. 305, 71 Am. St. Rep. 623.

In *Nichols v. Insurance Co.* (June, 1903) 176 Mo. 355, 75 S. W. 664, 62 L. R. A. 657, it was held that the term "paid-up insurance," under the statute, meant insurance for life, fully paid up, and not temporary paid-up insurance.

¹⁸⁵ *Universal Life Ins. Co. v. Devore*, 88 Va. 778, 14 S. E. 532. But in *Wilcox v. Society*, 173 N. Y. 50, 65 N. E. 857, 93 Am. St. Rep. 579, reversing same case, 55 App. Div. 529, 67 N. Y. Supp. 269, it was held that the insured's right to a paid-up policy was not defeated by his failure to surrender his policy in accordance with the terms of the contract, due to the fact that it had been stolen from him without his fault, he having performed all other conditions, and that he was entitled to a decree for a paid-up policy without first executing to the insurer a separate discharge or surrender of the policy.

Rules of Construction.

We must first note that the theory of all nonforfeiture policies and statutes is the preservation to the insured of the equitable value of his policy despite his default in the payment of premiums.¹⁸⁶ Such protection to the insured against the evil consequences of his own neglect or misfortune in regard to payment of premiums is the purpose of both statute and contract. Hence the terms of such statutes are manifestly to be construed in favor of the insured, and likewise the provisions of policies, for the double reason that words should be construed strictly against the person using them, and also in order to effectuate, so far as possible, the general intent of the parties. These rules are well illustrated by two cases recently decided. In *Cravens v. New York Life Ins. Co.*¹⁸⁷ the statute of Missouri governing the contract provided that upon failure to pay any premium, after the second, the insured should be entitled to extended insurance, or, upon demand made within sixty days after default, he might receive a paid-up policy. The insured failed to pay the fifth or any subsequent annual premium, and died within the term for which his insurance was extended by the terms of the statute, never having demanded a paid-up policy. The insurer claimed the right to waive the demand for the paid-up policy, and to be therefore liable only for such an amount as should have been written in a paid-up policy at the time of default, which was found to be \$2,670. The plaintiff, however, claimed the full face of the policy, \$10,000, less unpaid premiums, under the provision for extended insurance. The court held that statute had been enacted for the benefit of the insured, and that none of its conditions could be waived to his prejudice. *Drury's Adm'x v. New York Life Ins. Co.*¹⁸⁸ involved the construction of a policy which provided for paid-up insurance upon surrender of the policy and demand made within six months after default in payment of any annual premium after the third, or, in the absence of such surrender and without request, it was stipulated that the insurance would be extended for the face of the policy during such term as was provided in a "table of loans and surrender values in paid-up or extended insurance." For the fourth annual premium the insured gave his note, in which it was stipulated that the policy should be forfeited by the nonpayment of interest and subsequent premiums, "except as to a surrender value or paid-up policy." The insured died within the term of extended insurance as fixed in the table, having left unpaid both interest and subsequent premiums. It was held that the insurer was liable for the full amount of the policy as extended insurance, that being one of the "surrender values" fixed in the table, and so within the exception contained in the terms of the note.

¹⁸⁶ *Carter v. Insurance Co.*, 127 Mass. 153.

¹⁸⁷ 148 Mo. 583, 50 S. W. 519, 53 L. R. A. 305, 71 Am. St. Rep. 623.

¹⁸⁸ (Ky.) 74 S. W. 663, 61 L. R. A. 714.

The contract for paid-up insurance may be set forth in a separate instrument, which the insurer agrees to issue, or it may be indorsed upon the original policy, or merely contained in the terms of that policy.¹³⁹ But in whatever form executed, the contract is subject to all the terms of the original policy, so far as they are not inconsistent with the new agreement.¹⁴⁰ But it has been held that the indorsement of a term granting paid-up insurance upon a policy amounts to a waiver of a known right to forfeit such policy.¹⁴¹ Neither does the incorporation of a nonforfeiture statute into the policy make a new contract. "When the statute provisions are adopted, in an endowment policy, for the purpose of qualifying the forfeiture clause, the clause thus qualified is to be so construed as to give the insured its full benefit, without altering any other provision of the policy."¹⁴² Accordingly it was held that extended insurance, given by the Massachusetts statute, became payable, under an endowment policy, at the expiration of the endowment period, in accordance with the terms of the policy, and not only at the death of the insured.¹⁴³

Same—Conditions Precedent—Time Within Which Demand for Paid-up Policy must be Made.

From what has been stated above, it is apparent that the insured cannot make good his claim to paid-up or extended insurance without first showing compliance with all conditions precedent that may have been imposed upon the right to such commutation by the policy.¹⁴⁴ Nonforfeitable policies usually contain a condition requiring that the policy holder shall surrender his policy and demand commuted insurance within a specified time. If a policy, by its terms forfeitable upon nonpayment of premiums, provides for paid-up insurance upon surrender of the policy "on or before it expires by nonpayment" of some stipulated premium, it seems to be generally held that the right to paid-up insurance is lost upon the forfeiture of the policy. A demand for such insurance on any day after that on which the premium became due is too late,¹⁴⁵ and, when the policy does not limit the time within which commuted insurance shall be demanded, the time of making such demand

¹³⁹ Harlow v. Insurance Co., 54 Miss. 425, 28 Am. Rep. 358.

¹⁴⁰ McDonnell v. Insurance Co., 85 Ala. 401, 5 South. 120; Merritt v. Insurance Co., 55 Ga. 103.

¹⁴¹ Cotton States Life Ins. Co. v. Edwards, 74 Ga. 220.

¹⁴² Carter v. Insurance Co., 127 Mass. 153.

¹⁴³ Carter v. Insurance Co., 127 Mass. 153. For statutory provisions for extended insurance under endowment policies, see Rev. St. Mo. § 5983; 3 Rev. St. N. Y. (8th Ed.) p. 1688.

¹⁴⁴ Union Cent. Life Ins. Co. v. Buxer, 62 Ohio St. 335, 57 N. E. 66, 49 L. R. A. 737; Universal Life Ins. Co. v. Devore, 88 Va. 778, 14 S. E. 532.

¹⁴⁵ Smith v. Insurance Co., 103 Pa. 177, 49 Am. Rep. 121; Meyer v. Insurance Co., 144 Ind. 439, 43 N. E. 448; Sheerer v. Insurance Co. (C. C.) 20 Fed.

is plainly at the option of the insured.¹⁴⁶ So when the policy provides for extended insurance without request or other act of the delinquent policy holder, unless he shall within a specified time demand paid-up insurance, there seems to be no question that such election is necessary before the insured may claim paid-up insurance.¹⁴⁷

But the provision, frequently found in life policies, simply stipulating that failure to pay designated premiums shall not forfeit the policy, provided it shall be surrendered and paid-up insurance demanded within a term specified, is difficult of construction, and has caused much confusion among the courts before which it has come. Some courts have held that the effect of such a provision is to confer a right upon the insured which may be demanded at any time within a reasonable period, and that the time specified in the contract for the surrender of the policy and making demand is not of the essence of the contract.¹⁴⁸ The reason for this view may best be given in the words of Du Relle, J., in Manhattan Life Ins. Co. v. Patterson:¹⁴⁹ "The policy was null and void, except for this remaining right. This right was absolute, and, while it is provided that the company would issue a paid-up policy 'upon the surrender of its policy within six months after such lapse,' the time was not of the essence of the contract. The whole consideration had gone. There is no pretext appearing in the record that the performance of its contract, for which it had received payment, was more oppressive at the time it was demanded than if it had been demanded within the six months provided for. Some argument is made that the delay in making the demand imposed upon the company the burden of unnecessary bookkeeping. This we do not regard as sufficiently burdensome to justify retaining the purchase money and refusing to deliver the goods. As said in the Montgomery Case: 'The premiums, by express convention, paid for both current insurance and a paid-up policy, and now to deny to the assured the benefit of a paid-up policy because the old one was not surrendered in time is, in the strictest and most obnoxious sense, a forfeiture. Such a claim is without support

886; Bussing's Ex'rs v. Insurance Co., 34 Ohio St. 222; People v. Widows' & Orphans' Ben. Life Ins. Co., 15 Hun (N. Y.) 8.

The violation of a condition against travel upon the seas without consent of the insurer, for which a policy declares that it shall become void, defeats a right to surrender that policy and obtain a paid-up policy for an amount fixed by the terms of the policy with reference to the number of premiums paid. Douglas v. Insurance Co., 83 N. Y. 492.

¹⁴⁶ Lovell v. Insurance Co., 111 U. S. 264, 4 Sup. Ct. 390, 28 L. Ed. 423.

¹⁴⁷ Cravens v. Insurance Co., 148 Mo. 583, 50 S. W. 519, 53 L. R. A. 305, 71 Am. St. Rep. 628; Drury's Adm'x v. Insurance Co. (Ky.) 74 S. W. 663, 61 L. R. A. 714. But see Blake v. Insurance Co., 123 Cal. 470, 56 Pac. 101.

¹⁴⁸ See Chase v. Insurance Co., 67 Me. 85; Dorr v. Insurance Co., 67 Me. 438; and Kentucky cases cited infra, note 150.

¹⁴⁹ 109 Ky. 624, 60 S. W. 383, 22 Ky. Law Rep. 1282, 53 L. R. A. 378, 95 Am. St. Rep. 393.

in reason, justice, or authority, and cannot be sanctioned in a court of equity." ¹⁵⁰

By the great weight of authority, however, such a requirement is regarded as a valid condition precedent, which must be strictly complied with.¹⁵¹ Thus it has been held that an offer to surrender a policy upon receipt of the paid-up term policy, although made within the required time, was not a sufficient compliance with the requirement that the policy "shall have been transmitted to and received by the company," within a time limit stated, before the insured should be entitled to commuted insurance.¹⁵² And this seems to be the sounder doctrine,

¹⁵⁰ The development of this doctrine in Kentucky is quite remarkable. In *Montgomery v. Insurance Co.*, 14 Bush (Ky.) 51, the court, in a carefully considered opinion, decided that the time at which a paid-up policy should be demanded was not of the essence of the contract, and that the right of the insured to receive commuted insurance was not forfeited by his failure to surrender his policy and make demand as required by the terms of the policy. The doctrine thus laid down was approved in *Johnson v. Insurance Co.*, 79 Ky. 403; *Northwestern Mut. Life Ins. Co. v. Fort's Adm'r*, 82 Ky. 269; *Southern Mut. Life Ins. Co. v. Montague*, 84 Ky. 653, 2 S. W. 443, 4 Am. St. Rep. 218; *Germania Life Ins. Co. v. Saur*, 7 Ky. Law Rep. 297; but was, in effect, overruled by the cases of *Hexter v. Insurance Co.*, 91 Ky. 357, 15 S. W. 863, and *Northwestern Mut. Life Ins. Co. v. Barbour*, 92 Ky. 429, 17 S. W. 796, 15 L. R. A. 449, which restricted the right of the insured to demand such paid-up policy to the time stipulated in the contract.

In *Mutual Life Ins. Co. v. Jarboe*, 102 Ky. 80, 42 S. W. 1097, 39 L. R. A. 504, 80 Am. St. Rep. 343—the next case to come before the court—the two preceding cases were disapproved, and the doctrine of the *Montgomery* Case re-established. The *Jarboe* Case was followed and approved in *Manhattan Life Ins. Co. v. Patterson*, 109 Ky. 624, 60 S. W. 383, 53 L. R. A. 378, 95 Am. St. Rep. 393, and again in *Washington Life Ins. Co. v. Miles*, 112 Ky. 743, 66 S. W. 740.

In the case last mentioned, the court, being pressed to state a time after which the right of the insured to a paid-up policy should terminate, designated five years—by analogy with the statute of limitations—as the extreme limit of time within which such demand might be successfully made. This rule was enforced so as to defeat a tardy claim in *Equitable Life Assur. Soc. v. Warren Deposit Bank* (Ky. 1903) 75 S. W. 275.

¹⁵¹ *KNAPP v. INSURANCE CO.*, 117 U. S. 411, 6 Sup. Ct. 807, 29 L. Ed. 960; *Attorney General v. Insurance Co.*, 93 N. Y. 70; *Smith v. Insurance Co.*, 103 Pa. 177, 49 Am. Rep. 121.

The fact that the insurer was enjoined from issuing any policies during the specified time was held to be no excuse for a failure to demand the paid-up policy during such time. *Universal Life Ins. Co. v. Whitehead*, 58 Miss. 226, 38 Am. Rep. 322.

The death of the insured does not terminate the right to a paid-up policy, where within the time specified the owner of the policy surrenders it and demands the paid-up policy. *WHEELER v. INSURANCE CO.*, 82 N. Y. 543, 37 Am. Rep. 594. See, also, *Dorr v. Insurance Co.*, 67 Me. 438.

But the loss of the policy without fault of the owner excuses failure to surrender within time designated. *Wilcox v. Society*, 173 N. Y. 50, 65 N. E. 857, 93 Am. St. Rep. 579.

¹⁵² *Universal Life Ins. Co. v. Devore*, 88 Va. 778, 14 S. E. 532.

as well as the more reasonable practice. There seems to be no more reason for saying that the forfeiture of a right to commuted insurance by reason of a failure to surrender the original policy and make demand within a time agreed upon is an inequitable penalty, than to say the same of the forfeiture of all rights under a policy for the least default in making payment of a premium due, the validity of which has never been questioned. The insurer has a right to know, within a reasonable time, the status of delinquent policies. Such knowledge is necessary, in fact, to the safe and proper conduct of the insurer's business, especially in regard to the apportionment of dividends among surviving policy holders; and a requirement that the delinquent policy holder shall, within a reasonable time, make known his intentions with reference to the continuance of his insurance, is reasonable, and should be enforced as summarily as the provision for the payment of premiums.

It would seem, however, that a different rule should apply to provisions forfeiting paid-up policies for failure to pay interest on notes given to the insurer. As to such interest dues, the insurer occupies the position of a money lender, who should not be allowed to enforce a penalty imposed for the purpose of collecting an amply secured debt. As shown heretofore,¹⁵³ however, there is much authority to the contrary.

Same—Required Premium Paid by Note.

The right to paid-up or term insurance is usually conditioned upon the full payment in cash of a designated number of premiums, two or three being ordinarily required. Without making these required payments in the manner stipulated, the insured can make no valid claim to such a right.¹⁵⁴ Hence, when notes have been given for any of the required premiums, the intention of the parties being to extend thereby the term for the payment of such premiums, no right to paid-up insurance can exist while such notes remain unpaid. The premiums have not yet been paid in the manner required by the terms of the policy. But it is competent for the parties to agree that a note shall be taken as a cash payment, or as part of a cash payment. Such a transaction amounts to a loan made by the insurer to the insured. If such be the nature of the transaction, as sufficiently proved, the insurer cannot deny that the premium has been paid substantially in cash, nor can he refuse to issue the commuted insurance if all other conditions have been satisfied. The indebtedness evidenced by the note will, however, constitute a lien upon the policy in favor of the insurer.¹⁵⁵

¹⁵³ *Supra*, p. 213.

¹⁵⁴ *Equitable Life Assur. Soc. v. Spillman*, 56 S. W. 710, 22 Ky. Law Rep. 183.

¹⁵⁵ *Brooklyn Life Ins. Co. v. Dutcher*, 95 U. S. 269, 24 L. Ed. 410. In this case the court said: "The part of the annual premium for which a note was to be given was, in substance and effect, a loan of so much money by

EFFECT OF NONPAYMENT OF PREMIUM NOTES.

82. The nonpayment of a premium note does not affect the rights and liabilities of the parties to the insurance contract, in the absence of express provision to that effect. It is frequently agreed, however, that the policy shall be forfeited by a failure to pay such a note at its maturity.

Such an agreement may be contained—(a) In the policy, or in both the policy and the note; in which cases it will be enforced in exact accordance with its terms. (b) In the note alone, when, by the better reason and authority, nonpayment of the note avoids the policy; but in some jurisdictions it is held that upon such nonpayment the insurer has merely a right to enforce a forfeiture, which must be done by some affirmative act.

Where there is no express agreement that the policy shall be avoided by a failure on the part of the insured to pay, at its maturity, a note given in payment of a premium, such a failure on his part to discharge his liability on the note does not work a forfeiture of the policy, but merely gives the insurer a right of action on the note.¹⁸⁸

the company to the assured. It was so described in the receipt of the company for the premium, and in the contract of the parties. If the money had been actually paid to the company, and the next moment loaned back, and the note then taken, there would not have been room even for a quibble upon the subject. Why go through such a ceremony? Why not go directly, as was done, to the end in view? The intent which animated the conduct of the parties determines its character. The receipt and contract both show that the transaction was regarded by both parties as a payment of money to one, and a loan back to the other, for which the note was taken. The receipt was for the full amount of the premium. The note and loan were mentioned by way of memorandum, as a distinct matter. The law never requires an idle thing to be done. It would clearly have been this, and nothing else, if the assured had actually handed over the money and note with one hand, and, eo instante, with the other taken back the money. The company had the power to waive the actual production and payment of the money, and to receive a note bearing interest, as the same thing. It has exercised this power, and is estopped to deny the consequence." See, also, *Bruce v. Insurance Co.*, 58 Vt. 253, 2 Atl. 710. In an action for breach of contract to issue a paid-up policy, it seems that the amount of damages is not the whole sum paid as premiums, but the equitable value of the policy; i. e., the amount necessary in order to purchase a paid-up policy for the stipulated sum in a reputable company. See *Phoenix Mut. Life Ins. Co. v. Baker*, 85 Ill. 410; *Union Cent. Life Ins. Co. v. McHugh*, 7 Neb. 66; *Rumbold v. Insurance Co.*, 7 Mo. App. 71; *Missouri Valley Life Ins. Co. v. Kelso*, 16 Kan. 481. But see *Watts v. Insurance Co.*, 16 Blatchf. 228, Fed. Cas. No. 17,294; *Farley v. Insurance Co.*, 41 Hun (N. Y.) 303; *Nashville Life Ins. Co. v. Mathews*, 8 Lea (Tenn.) 499. But where the insured elects to consider the regular policy as in force, the measure of damages is the difference between the value of a paid-up policy and the life policy retained by the insured. *American Life Ins. & Trust Co. v. Shultz*, 82 Pa. 46.

¹⁸⁸ *Shaw v. Insurance Co.*, 69 N. Y. 287; *Michigan Mut. Life Ins. Co. v.*

The right to accept a promissory note in payment of a premium is a necessary incident to the right to issue a policy of insurance,¹⁸⁷ and a legal presumption arises that, where the insurer chooses thus to accept notes instead of a cash payment, he is acting in the furtherance of his own interests. If no stipulation is inserted providing for the forfeiture of the policy in case of nonpayment of the note at maturity, the rights and obligations of the parties under the contract of insurance are the same as if a cash payment had been made.¹⁸⁸

The parties to the contract may, however, enter into an agreement that the failure to make payment of any premium note at its maturity shall work a forfeiture of the policy. Such provisions are usually inserted either in the policy or in the note itself, and it becomes necessary to determine what effect will be given them in each case.

Where there is a Stipulation in the Policy.

Where the policy contains a provision that a failure by the insured to pay a premium note at its maturity shall avoid the policy, this stipu-

Bowes, 42 Mich. 19, 51 N. W. 962; *Stepp v. Association*, 37 S. C. 417, 16 S. E. 134; *Massachusetts Ben. Life Ass'n v. Robinson*, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261; *Griffith v. Insurance Co.*, 101 Cal. 627, 36 Pac. 113, 40 Am. St. Rep. 96.

Where there is a provision in a policy that, in case of any loss under the policy, the insurer may deduct an unpaid premium note, such a provision will be enforced, despite the fact that the statute of limitations might prevent a recovery on the note. *ALEXANDER v. INSURANCE CO.*, 67 Wis. 422, 30 N. W. 727, 58 Am. Rep. 869.

Premiums are sometimes paid, in whole or in part, by assessment notes. The liability on such notes is contingent upon the levying of an assessment in prescribed mode, and under proper authority. They are not negotiable. *Savage v. Medbury*, 19 N. Y. 32. Notes known as "capital stock notes" are sometimes given, under statutory authorization, as a part of the capital stock of a corporation. *Howland v. Edmonds*, 24 N. Y. 307; *White v. Haight*, 16 N. Y. 310.

¹⁸⁷ *Farmers' Bank of Saratoga v. Maxwell*, 32 N. Y. 579. A note given in payment of a premium on a policy which is void is without consideration and unenforceable. *FROST v. INSURANCE CO.*, 5 Denio (N. Y.) 154, 49 Am. Dec. 234; *Lynn v. Burgoyne*, 13 B. Mon. (Ky.) 400. It was held in a Massachusetts case, however, that a promissory note received in payment of a premium by the officers of the company, who were ignorant of the fact of its insolvency, was given for a valid consideration, and enforceable. *Lester v. Webb*, 5 Allen, 569.

Where an insurance company takes the notes of some person other than the insured, it cannot, as against the insured, insist that they did not amount to a payment. *Michigan Mut. Life Ins. Co. v. Bowes*, 42 Mich. 19, 51 N. W. 962. So if an agent accepts in payment of a premium the note of a third person, a failure to discharge the note at maturity does not forfeit the policy, even though it contains a stipulation providing that the failure to pay any premium note at its maturity shall avoid the policy. *Galvin v. Insurance Co. (Ky.)* 74 S. W. 275.

¹⁸⁸ *Massachusetts Ben. Life Ass'n v. Robinson*, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261; *Stepp v. Association*, 37 S. C. 417, 16 S. E. 134.

lation will be enforced in exact accordance with its terms. As soon as the note becomes due and unpaid, the insurer is released from all liability under the contract, and this notwithstanding the fact that he may have failed to make demand, or to give the insured notice of the maturity of the note, unless the giving of such notice be required by statute.¹⁵⁹

The forfeiture takes place as soon as the note is due and unpaid, and no subsequent proceedings instituted by the insurer for the purpose of enforcing the collection of the note will be construed as a waiver of it.¹⁶⁰ When, in addition to the provision in the policy, a similar stipulation is contained in the note itself, the same results will naturally follow a failure to make due payment of the note.¹⁶¹

When the Stipulation is in the Note Alone.

In several cases it has been held that a different rule applies where the condition of forfeiture upon nonpayment of a premium note at maturity is found in the note only.¹⁶² The failure to pay such a note, it is said, does not avoid the policy ipso facto, in accordance with the terms of the note, but merely gives the insurer a right to terminate a policy by some affirmative act; and that, in the absence of evidence showing a clear intent on the part of the insurer so to avoid a policy, he will be deemed to have waived his right to do so.¹⁶³ This doctrine is based on the theory that nonpayment of the note makes the contract only voidable, not void; and that therefore some act on the part of the insurer is needed to make it void. "The mere nonpayment of the note was not, alone," said the Ohio court in a leading case,¹⁶⁴ "sufficient to avoid the policy. Such payment was not a condition precedent to the attaching or continuing of the risk. It was rather a note with a condition of defeasance, that might be made operative if desired." In a

¹⁵⁹ *Holly v. Insurance Co.*, 105 N. Y. 437, 11 N. E. 507; *McIntyre v. Insurance Co.*, 52 Mich. 188, 17 N. W. 781; *Roehner v. Insurance Co.*, 63 N. Y. 160; *Muhleman v. Insurance Co.*, 6 W. Va. 508; *Imperial Life Ins. Co. v. Glass*, 96 Ala. 568, 11 South. 671; *Bigelow v. Association*, 123 Mass. 113.

Otherwise where a statute requires notice. *Bradford v. Insurance Co.*, 112 Iowa, 495, 84 N. W. 693.

¹⁶⁰ *National Life Ass'n of Hartford v. Brown*, 103 Ga. 382, 29 S. E. 927.

¹⁶¹ *Thompson v. Insurance Co.*, 104 U. S. 252, 26 L. Ed. 765; *Baker v. Insurance Co.*, 43 N. Y. 283.

¹⁶² *Mutual Life Ins. Co. v. French*, 30 Ohio St. 240, 27 Am. Rep. 443, approved in *Thompson v. Insurance Co.*, 104 U. S. 252, 26 L. Ed. 765; *Montgomery v. Insurance Co.*, 14 Bush (Ky.) 51. But see *Manhattan Life Ins. Co. v. Pentecost*, 105 Ky. 642, 49 S. W. 425; *Same v. Myers*, 109 Ky. 372, 59 S. W. 30, 53 L. R. A. 378, 95 Am. St. Rep. 393; *Dwelling House Ins. Co. v. Hardie*, 37 Kan. 674, 16 Pac. 92. See, also, *McALLISTER v. INSURANCE CO.*, 101 Mass. 558, 3 Am. Rep. 404; *TRADE INS. CO. v. BARRACLIFF*, 45 N. J. Law, 543, 46 Am. Rep. 792; and *Fithian v. Insurance Co.*, 4 Mo. App. 386.

¹⁶³ See cases cited in preceding note.

¹⁶⁴ *Mutual Life Ins. Co. v. French*, 30 Ohio St. 240, 27 Am. Rep. 443.

Kentucky case ¹⁶⁵ it was said that to enforce such a condition would be to impose a penalty upon the nonpayment of a debt.

But these views are clearly erroneous, and without any sound basis of reason. It can make no possible difference in legal contemplation whether the condition avoiding the policy for nonpayment of a premium note is written on the face of the policy, or on the face of the note, or on a premium receipt, or in any other properly executed instrument. It is equally a part of the contract, and should be enforced as made. If the insured has signed, and the insurer has received, a premium note in which it is stipulated that if it shall not be paid at maturity the policy is to be null and void, a failure to pay operates of itself to avoid the contract, and the mere fact that the insurer may waive the forfeiture if he sees fit does not affect the case. Forfeitures for nonpayment of premiums due can also be waived. To hold otherwise is to make a new contract for the parties.¹⁶⁶ The question came squarely before the federal Supreme Court recently in the case of *Iowa Life Ins. Co. v. Lewis*,¹⁶⁷ in which the condition of forfeiture was contained only in the receipt given for a premium paid by note. It was held, reversing the judgment of the Circuit Court, that upon the nonpayment of the note at maturity the insurance ceased without further act by the insurer.

DUES AND ASSESSMENTS IN MUTUAL BENEFIT SOCIETIES.

83. Dues are fees payable to associations for the purpose of defraying the ordinary expenses of administration. Assessments are sums payable as ratable contributions to make good a loss which the association has agreed to indemnify. The nature of the liability, and the consequence of nonpayment, depend in each case upon the terms of the contract.

84. No assessment is payable unless reasonable, and levied in strict accordance with the authority conferred by the charter, by-laws, and certificate. There is no presumption that an assessment is valid. The burden of proving it so is upon the association.

¹⁶⁵ *Montgomery v. Insurance Co.*, 14 Bush, 51.

¹⁶⁶ In *Holly v. Insurance Co.*, 105 N. Y. 437, 11 N. E. 507, Peckham, J., uses the following strong language: "To that extent it was an alteration of the terms of the policy, giving thirty days after a default in which to surrender and make a demand, and instead thereof it plainly provided for a total and immediate forfeiture if at maturity the note were not paid. If language as plain and unambiguous as this is not only to be twisted out of its natural meaning, but is to be wholly ignored by courts of justice, it will be useless in the future for companies to make any effort to bind policy holders to perform their contracts. The use of language is to express ideas, and writing is resorted to in order to furnish conclusive proof of what language was used. Being certain of the language used, and the case being free from fraud and mistake, if such language is plain and susceptible of but one meaning, that meaning, even in cases regarding contracts of life insurance, must control, though a forfeiture should be the result."

¹⁶⁷ 187 U. S. 335, 23 Sup. Ct. 126, 47 L. Ed. 204. To the same effect, see

Mutual benefit associations, from their nature, can only accomplish the purpose for which they are organized, and meet the losses which they necessarily incur, when the individual members of the organization are regular and prompt in meeting the obligations imposed upon them by the terms of their contract, as set forth in the charter or by-laws of the association or the certificate of membership. Chief among these obligations, and the one which constitutes, to the greatest extent, the consideration for the benefits which result to the members, is the promise to pay all properly levied dues and assessments, under penalty of forfeiting membership in the organization on nonpayment.¹⁶⁸

In order, however, for the member to be under an obligation to pay an assessment, the assessment must be shown to have been legally levied under proper authority, and it must be reasonable.¹⁶⁹ In determining whether an assessment has been properly levied, the charter and by-laws of the association must be examined. Each case is, of course, to be governed by the terms of the contract, by which alone the rights and obligation of the parties can be ascertained. The authority to levy assessments is usually vested in the board of directors of the association, who, when such authority has been given them, may exercise a reasonable discretion in determining the necessity for an assessment,¹⁷⁰ and may fix or change the rate of the assess-

Holly v. Insurance Co., 105 N. Y. 437, 11 N. E. 507; *Ressler v. Insurance Co.*, 110 Tenn. 411, 75 S. W. 735. See, also, *Kerns v. Insurance Co.*, 86 Pa. 171; *Frank v. Assurance Co.*, 20 Ont. App. 564.

¹⁶⁸ When a provision that the insured shall pay certain assessments in addition to cash premiums is made a part of the consideration for the policy, and a condition of it, the acceptance of the policy is tantamount to an agreement to make such payments. *Whipple v. Insurance Co.*, 20 R. I. 260, 38 Atl. 498.

The member's promise to pay the assessments when duly called to meet the obligations of the company accruing upon the deaths of other members is the consideration for the benefit he derives from his insurance as a member of the society. *Ellerbe v. Barney*, 119 Mo. 632, 25 S. W. 334, 23 L. R. A. 435.

¹⁶⁹ *Rosenberger v. Insurance Co.*, 87 Pa. 207; *Sands v. Graves*, 58 N. Y. 94; *American Mut. Aid Soc. v. Helburn*, 85 Ky. 1, 2 S. W. 495, 7 Am. St. Rep. 571; *Hartford Ins. Co. v. Hyde*, 101 Tenn. 396, 48 S. W. 968.

¹⁷⁰ *Vandalia Mut. County Fire Ins. Co. v. Peasley*, 84 Ill. App. 138; *Rosenberger v. Insurance Co.*, 87 Pa. 207.

Where the by-laws of a mutual benefit society provide that assessments for death losses shall be levied by the board of directors, the board cannot delegate such power to the president. *Garretson v. Association*, 93 Iowa, 402, 61 N. W. 952.

In case of the insolvency of a mutual benefit association, a court of equity may authorize the levying of an assessment by an officer of the court. *Whitaker v. Meley*, 61 N. J. Law, 1, 38 Atl. 840.

An order authorizing a receiver of a company to make a special assessment on a policy, if within the jurisdiction of the court, cannot be questioned

ment, provided the apportionment is equitable.¹⁷¹ If the member is assessed for more than his just proportion, he is excused from payment;¹⁷² so, also, if the assessment is for losses incurred before he became a member, or after his membership in the association has terminated.¹⁷³

Where a mutual benefit association relies upon the failure of any member to pay an assessment as a forfeiture of his membership and all benefits to which he was entitled, the association must show that the assessment was legally made, in strict accordance with the charter and by-laws.¹⁷⁴ If the defendant, however, seeks to excuse his failure to

in a collateral or ancillary proceeding. *Capital City Mut. Fire Ins. Co. v. Boggs*, 172 Pa. 91, 33 Atl. 349.

¹⁷¹ *Ebert v. Association*, 81 Minn. 116, 83 N. W. 506; *Barbot v. Association*, 100 Ga. 681, 28 S. E. 498.

A limitation of six months in the by-laws of a mutual insurance company, within which an assessment may be questioned, is valid. *Survick v. Association (Va.)*, 23 S. E. 223.

¹⁷² *United States Mut. Acc. Ass'n v. Mueller*, 151 Ill. 254, 37 N. E. 882.

So, also, if other members liable to be assessed are knowingly omitted. *Swing v. Lumber Co.*, 62 Minn. 169, 64 N. W. 97. But slight errors in making an assessment, which do not substantially affect the rights of the parties, do not make the assessment invalid. *Thropp v. Insurance Co.*, 125 Pa. 427, 17 Atl. 473, 11 Am. St. Rep. 909.

The mere fact that the insured had paid mortuary assessments higher than he was bound to pay under his certificate in an assessment life insurance company, in the absence of any showing of fraud, or that any one had been misled by his conduct, did not estop him from contesting subsequent assessments greater than he was bound to pay. *Covenant Mut. Life Ass'n v. Kentner*, 188 Ill. 431, 58 N. E. 966.

¹⁷³ *Capital City Mut. Fire Ins. Co. v. Boggs*, 172 Pa. 91, 33 Atl. 349; *Koehler v. Beeber*, 122 Pa. 291, 16 Atl. 354. A failure to pay an assessment levied on a member for a death which occurred prior to the date of his certificate, the assessment being contrary to the plain provisions of a by-law of the union, will not invalidate the claim of his representatives to benefits. *Rowswell v. Union (C. C.)*, 13 Fed. 840.

¹⁷⁴ As it is well expressed by Bennett, J., in a leading Kentucky case: "Thus we see that, in making assessments by the appellant [the society] upon its members, it does not act in a judicial, but in a ministerial, capacity. Therefore no presumption can arise in favor of the regularity or legality of its assessments. That the appellant's board of directors, or an executive committee appointed by them, are the only persons authorized by appellant's charter to make assessments against its surviving members, to pay the benefits due the representatives of its deceased members. That a deceased member of the society should have died, and that his representative was entitled to a benefit arising from his death, and that an assessment upon all the surviving members was actually made by the board of directors, or an executive committee appointed by them, for the purpose of paying said assessments, are conditions precedent to the right of the appellant to demand payment of an assessment from any of its members. And they are not bound to pay any assessment until these things occur. Nor do they forfeit their membership by reason of their failure to pay such assessments, unless these

pay by showing fraud or misconduct on the part of the association, the burden of proving this is upon him.¹⁷⁵

Assessments—When Reasonable.

Even though an assessment be properly levied, and for a duly authorized purpose, yet the members of the association will be excused from payment unless it can also be shown to be reasonable. Whether or not this requirement is satisfied can only be determined by a consideration of each particular case as it arises, as, manifestly, it would be impossible to lay down any general rule which could safely be followed. In a leading Pennsylvania case it was held that, where an association was authorized by its charter to levy assessments to pay present losses, any further assessment made in anticipation of future losses would be an unreasonable exercise of the discretion, as to fixing the amount, given to the directors. Such an assessment, it was held, would consequently be illegal and void, and the members of the association excused from paying it.¹⁷⁶

The body which has authority to make the by-laws of an association may also, as a rule, amend or repeal them, subject to the restrictions imposed by the charter or articles of the association; but any such changes or amendments must be reasonable,¹⁷⁷ and, if this condition is not satisfied, assessments made under authority of such amended by-laws are invalid. An association may make a change in its regular rate of assessment when levies made in accordance with the new rate will be reasonable as to a member who has assented to the change, although unreasonable as to other members who have withheld their assent.¹⁷⁸

things have occurred. And when the society relies upon the failure of any of its members to pay his assessments, as a forfeiture of his membership and benefits under its charter, it must show affirmatively that the assessment was made in the manner indicated, otherwise the member cannot be said to be in default." *American Mut. Aid Soc. v. Helburn*, 85 Ky. 1, 2 S. W. 495, 7 Am. St. Rep. 571. The association must also show that an assessment was necessary. *Pacific Mut. Ins. Co. v. Guse*, 49 Mo. 329, 8 Am. Rep. 132; *Susquehanna Mut. Fire Ins. Co. v. Gackenbach*, 115 Pa. 492, 9 Atl. 90.

The record of an assessment of a mutual insurance association, reciting that the resolution ordering the assessment "was unanimously adopted by the directors, as a body, and by the executive committee," is prima facie evidence of its validity. *Anderson v. Association*, 171 Ill. 40, 49 N. E. 205.

¹⁷⁵ *Rosenberger v. Insurance Co.*, 87 Pa. 207; *Susquehanna Mut. Fire Ins. Co. v. Gackenbach*, 115 Pa. 492, 9 Atl. 90.

¹⁷⁶ *Rosenberger v. Insurance Co.*, 87 Pa. 207.

¹⁷⁷ *Thibert v. Supreme Lodge*, 78 Minn. 448, 81 N. W. 220, 47 L. R. A. 136, 79 Am. St. Rep. 412; *Mutual Reserve Fund Life Ass'n v. Taylor*, 99 Va. 208, 37 S. E. 854.

As to what changes are deemed reasonable, see *supra*, p. 194.

¹⁷⁸ *Mutual Reserve Fund Life Ass'n v. Taylor*, 99 Va. 208, 37 S. E. 854.

WHEN PREMIUMS MAY BE RECOVERED.

85. WHEN THE RISK HAS ONCE ATTACHED the whole premium is deemed to be earned, and no portion thereof is returnable, even though the risk may terminate before the expiration of the term contracted for, unless—

- (a) Such termination is due to the wrong of the insurer, or
- (b) Such return is required by statute.

86. When the risk has never attached, the premium paid is always returnable unless—

- (a) The contract was rendered void ab initio by the fraud of the insured, or
- (b) The contract is illegal, and the parties in pari delicto.

The general rule is that the insurance granted is the entire consideration for the premium received, and hence, if the risk has attached by reason of the contract's becoming binding upon the insurer, the whole premium must be considered as earned, and therefore cannot be apportioned in case the risk terminates before the end of the term for which the insurance was granted.¹⁷⁹ Thus, in the leading case of *Tyrie v. Fletcher*,¹⁸⁰ the plaintiff had procured insurance upon a certain vessel for a period of twelve months, in consideration of a certain premium paid. The vessel was taken by an American privateer some two months after the inception of the policy. This being an excepted risk, and the underwriter thus being discharged from all liability under the contract for the remaining portion of the term agreed upon, the insured brought suit to recover a proportionate part of the premium paid. But the judgment of the court was in favor of the defendant, Lord Mansfield saying, in his opinion: "that, if that risk of the contract of indemnity has once commenced, there shall be no apportionment or return of premium afterward. For though the premium is estimated, and the risk depends, upon the nature and length of the voyage, yet if it has commenced, though it be for only twenty-four hours or less, the risk is run. The contract is for the entire risk, and no part of the consideration shall be returned." The rule thus laid down by Lord Mansfield has never been questioned.¹⁸¹ Of course, when the contract

¹⁷⁹ *Tyrie v. Fletcher*, Cowp. 666; *Richards, Ins. Cas.* 265; *Hendricks v. Insurance Co.*, 8 Johns. (N. Y.) 1; *Waters v. Allen*, 5 Hill (N. Y.) 421; *Continental Life Ins. Co. v. Houser*, 111 Ind. 266, 12 N. E. 479; *Joshua Hendy Mach. Works v. American Steam Boiler Ins. Co.*, 86 Cal. 248, 24 Pac. 1018, 21 Am. St. Rep. 33.

See, also, *Blaeser v. Insurance Co.*, 37 Wis. 31, 19 Am. Rep. 747; *Taylor v. Lowell*, 3 Mass. 331, 3 Am. Dec. 141; *Metropolitan Life Ins. Co. v. McCormick*, 19 Ind. App. 49, 49 N. E. 44, 65 Am. St. Rep. 392.

¹⁸⁰ Cowp. 666; *Richards, Ins. Cas.* 265.

¹⁸¹ See Civ. Code Cal. § 2618; *Mallhoit v. Insurance Co.*, 87 Me. 374, 32 Atl. 989, 47 Am. St. Rep. 336, and cases cited *supra*, note 179.

is divisible, consisting of several distinct risks, the premium paid for any particular risk is not earned until that risk has attached.¹⁸²

The general rule stated above applies when valid insurance is terminated by any cause whatsoever, excepting the act of the insurer himself.¹⁸³ It is frequently stipulated, however, in fire policies, that either party to the contract may, after notice given to the other, terminate the insurance, in which event an agreed proportion of the premium is returnable.¹⁸⁴ So the law gives to an infant insured the right to terminate his contract of life insurance without suffering the consequences to which the adult is subject. He will not be allowed to recover the premiums paid, however, but only the equitable value of his insurance at the time of repudiation.¹⁸⁵ It seems, however, that an infant would not be allowed to rescind his contract of fire insurance, if the risk had attached, and recover any part of the premium paid. He could not restore the consideration received, which is the incurring the

¹⁸² In *Stevenson v. Snow* (1761), 3 Burr. 1237, 1 W. Bl. 318, a ship was insured, "lost or not lost, at and from London to Halifax, warranted to depart with convoy from Portsmouth, for the voyage." The convoy left the ship before she reached Portsmouth. The underwriters were notified, and requested either to make long insurance, or to return part of the premium, and, on their refusal, an action was brought to secure the return of a proportionate part of the premium for the voyage from Portsmouth to Halifax. On the trial it was shown that it was the custom of underwriters to treat such contracts as divisible, and to return a proportionate part of the premium; and the court, construing the contract according to the intent of the parties, decreed the return. See, to same effect, *Gale v. Machell* (1785) 2 Marsh. Ins. 667; *Long v. Allen* (1785) 4 Doug. 276. But see *Meyer v. Gregson* (1784) 3 Doug. 402, distinguishable on the ground that no usage was found to regard the contract as divisible.

Where the policy was on a voyage "at and from New York to Montevideo and Buenos Ayres, and at and from thence back to New York," and the stipulation for premium was "one and three-fourths per cent. each way," in an action on premium notes by the insurer, the vessel having been burned by her master soon after leaving New York (this, of course, discharging the insurer), it was held that the contract was divisible, and he could recover the premium for the outward voyage only. *Waters v. Allen*, 5 Hill (N. Y.) 421.

¹⁸³ Any breach of condition by the insured whereby his policy is forfeited will deprive him of all rights in the unearned portion of the premium paid. *Dickerson v. Insurance Co.* (1902) 200 Ill. 270, 65 N. E. 694; *Phoenix Ins. Co. v. Stevenson*, 78 Ky. 150. Where new insurance was taken out before the presentation of the first insurance policy for cancellation, and the first policy contained the usual clause avoiding it in case of additional insurance, the insured cannot recover the unearned portion of the premium. *Farmers' Mut. Ins. Co. v. Phenix Ins. Co.* (Neb. 1902) 90 N. W. 1000.

¹⁸⁴ See *International Life Ins. & Trust Co. v. Franklin Fire Ins. & Trust Co.*, 66 N. Y. 119; *Hollingsworth v. Insurance Co.*, 45 Ga. 294, 12 Am. Rep. 579.

¹⁸⁵ *JOHNSON v. INSURANCE CO.*, 56 Minn. 365, 59 N. W. 992, 26 L. R. A. 187, 45 Am. St. Rep. 473; *Elliott, Ins. Cas. 5*; *Woodruff, Ins. Cas. 22*. See supra, p. 91.

risk by the insurer, and should not be allowed to recover what he has paid.¹⁸⁶

When Insurance Terminated by Act of Insurer.

The insurer cannot himself terminate his liability and retain the premium paid him. Even though he may act in perfect good faith in repudiating the contract for a supposed breach of condition, yet, if his act is in fact wrongful, he will not be allowed to retain the premium paid.¹⁸⁷ The most frequently occurring instance of the insurer's repudiation of his contract is his wrongful declaration of a forfeiture not really incurred. Any other act showing a clear intention on the part of the insurer not to be bound by the policy is, however, sufficient.¹⁸⁸ Thus the wrongful expulsion of a member of a mutual benefit association, whereby he is denied any rights to benefits contracted for, will afford ground for an action to recover premiums paid.¹⁸⁹ So an assignment made by an insolvent insurer for the benefit of his creditors constitutes a breach of his contract, and the claims of the policy holders for damages must be reckoned among the liabilities of the insolvent.¹⁹⁰

When the contract repudiated by the insurer grants insurance for a definite term, for which a definite premium has been paid, as in the customary contract of fire insurance, it is clear that the insured is entitled to receive again the entire premium paid, with interest. The contract

¹⁸⁶ See *Rice v. Butler*, 160 N. Y. 578, 55 N. E. 275, 47 L. R. A. 303, 73 Am. St. Rep. 703.

There is a conflict of opinion as to whether an infant who has paid cash, and is unable to return the consideration, may disaffirm his contract and recover the cash paid. The trend of modern authority seems to favor the doctrine as stated in the text.

¹⁸⁷ *McCall v. Insurance Co.*, 9 W. Va. 237, 27 Am. Rep. 558; *McKee v. Insurance Co.*, 28 Mo. 383, 75 Am. Dec. 129. See, also, *Braswell v. Insurance Co.*, 75 N. C. 8.

¹⁸⁸ If a mutual company, by virtue of an act of the legislature, abandons its plan of insurance without the insured's knowledge or consent, and thereby reduces its funds upon which the insured relies for payment of endowments contracted for, he may rescind the contract, and is entitled to a return of the premiums paid thereon. *People's Mut. Ins. Fund v. Bricken*, 92 Ky. 297, 17 S. W. 625. So where a benefit society issued plaintiff a certificate for \$5,000, and by a subsequent by-law reduced all certificates to \$2,000, it was held that a tender of a certificate for \$2,000 to the plaintiff amounted to such a repudiation of the contract as entitled him to recover all premiums paid. *Supreme Council American Legion of Honor v. Jordan*, 117 Ga. 808, 45 S. E. 33.

¹⁸⁹ But such a member is not entitled to a recovery of premiums because of wrongful expulsion when he has neglected to pursue within the order such remedies as were open to him under the association's regulations. *Supreme Council Catholic Knights of America v. Gambati*, 29 Tex. Civ. App. 80, 69 S. W. 114.

¹⁹⁰ *Clark v. Insurance Co.*, 130 Ind. 332, 30 N. E. 212. See, also, *In re Minneapolis Mut. Fire Ins. Co.*, 49 Minn. 291, 51 N. W. 921; *Smith v. Insurance Co.*, 65 Minn. 283, 68 N. W. 28, 33 L. R. A. 511.

is entire, and the considerations given by the respective parties not apportionable. Hence a failure on the part of the insurer to give any part of the insurance promised works a total failure of consideration for the premium received, which may, consequently, be recovered by the insured as money had and received. But when the contract so repudiated is in the form of the usual life insurance contract, for the indefinite term of a life's duration, and for a consideration paid in periodic premiums, it is much more difficult to arrive at a just determination of the rights of the parties. In *Day v. Connecticut General Life Ins. Co.*¹⁹¹ it is stated that, if the insurer wrongfully declares a policy forfeited, three courses are left open to the insured: (1) He may elect to consider the policy at an end, and in a proper action recover its just value; or (2) he may institute proceedings to have the policy adjudged in force; or (3) he may tender the premium, and then wait till the policy became payable by its terms, when it can be enforced. This statement of the law has been approved by Mr. Bacon,¹⁹² and adopted by at least one court,¹⁹³ but there is much difference of opinion as to whether the insurer, upon breach of the contract, shall be liable to pay to the insured the "just value" of the policy,¹⁹⁴ or the sum of all the premiums received,¹⁹⁵ or such sum as will, under the circumstances of the particu-

¹⁹¹ 45 Conn. 480, 29 Am. Rep. 693.

¹⁹² Bac. Ben. Soc. § 376. See, also, Joyce, Ins. § 1659.

¹⁹³ Mutual Reserve Fund Life Ass'n v. Taylor, 99 Va. 208, 37 S. E. 854.

¹⁹⁴ *Day v. Insurance Co.*, 45 Conn. 480, 29 Am. Rep. 693; *Lovell v. Insurance Co.*, 111 U. S. 264, 4 Sup. Ct. 390, 28 L. Ed. 423.

¹⁹⁵ The rule that upon the insurer's wrongful termination of the contract the insured is entitled to recover all premiums paid, with interest on each from the date of payment, seems supported by the clear weight of authority. *McKee v. Insurance Co.*, 28 Mo. 383, 75 Am. Dec. 129; *McCall v. Insurance Co.*, 9 W. Va. 237, 27 Am. Rep. 558. In North Carolina there is a long and unbroken line of authorities to the same effect. *Braswell v. Insurance Co.*, 75 N. C. 8; *Lovick v. Association*, 110 N. C. 93, 14 S. E. 506; *Burrus v. Insurance Co.*, 124 N. C. 9, 32 S. E. 323; *Hollowell v. Insurance Co.*, 126 N. C. 398, 35 S. E. 616; *Strauss v. Association*, 126 N. C. 976, 36 S. E. 352, 54 L. R. A. 605, 83 Am. St. Rep. 699; s. c. 128 N. C. 468, 39 S. E. 55, 54 L. R. A. 605, 83 Am. St. Rep. 699; *Gwaltney v. Society*, 132 N. C. 925, 44 S. E. 659.

See, also, *Putnam v. Insurance Co.*, 42 La. Ann. 739, 7 South. 602; *VAN WERDEN v. SOCIETY*, 99 Iowa, 621, 68 N. W. 892; *Supreme Council American Legion of Honor v. Jordan*, 117 Ga. 808, 45 S. E. 33; *Suess v. Insurance Co.*, 64 Mo. App. 1; *Union Cent. Life Ins. Co. v. Pottker*, 33 Ohio St. 459, 31 Am. Rep. 555; *Helme v. Insurance Co.*, 61 Pa. 107, 100 Am. Dec. 621; *Fisher v. Insurance Co.*, 69 N. Y. 161.

In *Day v. Insurance Co.*, 45 Conn. 480, 29 Am. Rep. 693, an action was brought upon an implied contract of the insurer to receive the premiums tendered and keep the policy in force. The insured claimed to recover all premiums paid, although he had not elected to rescind the principal contract. The court denied the existence of such an implied contract, and held that no action would lie unless the contract were rescinded, in which case the "equitable and just value" of the policy might be recovered.

lar case, compensate him for the damage suffered.¹⁹⁶ In some respects a life insurance contract extends from year to year. The premium is paid, and the risk newly attaches, each succeeding year. It would therefore seem scarcely fair to the insurer to apply straitly the same rule as obtains in fire insurance contracts. During the years in which the policy was recognized as in force, the insured received protection as partial consideration for the premiums paid, and to allow him to recover the whole of his premiums, after having received such benefit, would be to accord him more than his due. Neither, it seems, would it be just in all cases to limit his recovery to the value of the policy at the time of breach. The insured is entitled to be put in as good a position as he occupied before the wrongful act of the insurer.¹⁹⁷ To give him the value of his policy would accomplish this result only when he is in good health and insurable. If he is suffering from a serious disease, or if for any other reason his expectancy of life is reduced below the average for his age, the equitable value of his policy would in no wise compensate him for its loss. For these reasons it would seem that the insurer should not be held liable for all the premiums paid, nor for the "just value" of the policy, but rather, as held by the Minnesota court,¹⁹⁸ for the damage actually resulting at the date of the repudiation, due account being taken of the value of insurance already had.¹⁹⁹

In case the insurer's insolvency occasions his breach of contract, the authorities seem agreed that the holders of fire policies are entitled to recover only the unearned portion of premiums paid, and not the whole amount.²⁰⁰ In life insurance the right of the insured against the insolvent insurer is to receive the equitable value of his policy, and not the premiums paid.²⁰¹

Statutes Requiring Return of Premiums.

Pursuant to the general legislative policy of protecting the unwary public against the lurking conditions of forfeiture in which policies are apt to abound, statutes have been enacted in some states requiring a return of premiums received by the insurer before he shall be allowed

¹⁹⁶ *Ebert v. Association*, 81 Minn. 116, 83 N. W. 506, 84 N. W. 457.

¹⁹⁷ "Where one party to an executory contract prevents performance of it, or puts it out of his own power to perform it, the other party may regard it as terminated and demand whatever damages he has sustained thereby." *Lovell v. Insurance Co.*, 111 U. S. 264, 4 Sup. Ct. 390, 28 L. Ed. 423.

¹⁹⁸ *Ebert v. Association*, 81 Minn. 116, 83 N. W. 506, 84 N. W. 457.

¹⁹⁹ See this view approved in *People v. Security Life Ins. & Annuity Co.*, 78 N. Y. 114, at page 126, 34 Am. Rep. 522.

²⁰⁰ *Smith v. Insurance Co.*, 65 Minn. 283, 68 N. W. 28, 33 L. R. A. 511. And see 1 Wood, Ins. § 147; *People v. Security Life Ins. & Annuity Co.*, 78 N. Y. 114, 34 Am. Rep. 522. *Dewey v. Davis*, 82 Wis. 500, 52 N. W. 774, seems to be contra.

²⁰¹ *People v. Security Life Ins. & Annuity Co.*, 78 N. Y. 114, 34 Am. Rep. 522; *Universal Life Ins. Co. v. Binford*, 76 Va. 103.

to set up, in defense of an action on the policy, any misrepresentation alleged to have been made in securing such policy.²⁰² Many other provisions varying the common-law rules may be found in the several states. Thus it is provided by the Civil Code of California²⁰³ that: "Where the insurance is made for a definite period of time and the insured surrenders his policy, he is entitled to a return of such proportion of the premium as corresponds with the unexpired time after deducting from the whole premium any claim for loss or damage under the policy which had previously accrued." So in Virginia it is provided that in case of the loss of property insured under a policy, by the terms of which the insurer is liable to pay less than the sum written on its face, and on which premiums have been paid, the insurer shall be held liable to return to the insured a part of the premium, proportioned to the excess of the amount of the policy over the amount actually paid.²⁰⁴

When the Risk has never Attached.

A second rule was laid down by Lord Mansfield, in *Tyrie v. Fletcher*,²⁰⁵ as a corollary to the one first quoted above, to this effect: "Where the risk has not been run, whether its not having been run was owing to the fault, pleasure, or will of the insured, or to any other cause, the premium shall be returned, because a policy of insurance is a contract of indemnity. The underwriter receives a premium for running the risk of indemnifying the insured, and whatever cause it be owing to, if he does not run the risk, the consideration for which the premium or money was put into his hands fails, and therefore he ought to return it."

The rule so stated, notwithstanding the eminent respectability of its origin, has not been accepted without qualification. Its terms are too broad. If the fault of the insured, to which the failure of the risk to attach was due, was willful and fraudulent, the insurer may nevertheless retain the premiums, for the insured shall not profit by his own wrong. If the policy was void from its inception by reason of the untruth of any representation or warranty, the right of the insured to have again his premiums depends solely on the character of the misrepresentation²⁰⁶—if fraudulent, he cannot recover;²⁰⁷ but if innocent,

²⁰² See section 5977, Rev. St. Mo., as applied in *NEW YORK LIFE INS. CO. v. FLETCHER*, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934.

²⁰³ § 2617.

²⁰⁴ See Acts Va. 1897-98, p. 636. For provisions of somewhat similar import in the French Code de Commerce, § 356, see Barb. Ins. p. 100.

²⁰⁵ Cowp. 666; Richards, Ins. Cas. 265.

²⁰⁶ *Fisher v. Insurance Co.*, 160 Mass. 386, 35 N. E. 849, 39 Am. St. Rep. 495. See Civ. Code Cal. § 2619.

²⁰⁷ *Himely v. Insurance Co.*, 1 Mill, Const. (S. C.) 153, 12 Am. Dec. 623; *Blaeser v. Insurance Co.*, 37 Wis. 31, 19 Am. Rep. 747.

he may recover.²⁰⁸ And the fact that the insurer would be estopped, by reason of his false representations in securing the policy, to deny his liability on the policy, does not prevent the innocent insured from avoiding the policy ab initio, and recovering all premiums paid, with interest thereon. As said by the court in *Hogben v. Metropolitan Life Ins. Co.*:²⁰⁹ "Her money had been paid in reliance on a valid contract, and not on the chance of an estoppel." But when the misrepresentations are not material to the insured, nor in any wise injure him, but affect the insurer only, the insured cannot rescind the contract and require the return of his premiums.²¹⁰

Same—Overinsurance.

Another application of the rule that premiums paid for a risk that never attaches are recoverable is found in the case of overinsurance. The law is thus stated by Mr. Arnould in his excellent work on Marine Insurance:²¹¹ "With regard to return of premium for short interest, overinsurance, and double insurance, the principle on which the cases depend is simply this: That if the underwriter could at any time, and under any conceivable circumstances, have been called on to pay the whole sum on which he has received premium, in such case the whole premium is earned, and there shall be no return. If, on the other hand, he could never in any event have thus been called on to pay the whole, but only a part of the amount of his subscription—say a half or a fourth—he ought not to retain a larger proportion than one-half or one-fourth of the premium, and must return the residue."

American marine policies usually contain a provision that, if the insurer shall be exonerated by prior insurance from any part of the sum insured, a ratable portion of the premium shall be returned.²¹²

When Insurance is Illegal.

When the insurance is void because illegal, the general rule is that the premiums cannot be recovered.²¹³ But if, in fact, the parties are not in pari delicto, the law will suffer an innocent insured to take again

²⁰⁸ *Jones v. Insurance Co.*, 90 Tenn. 604, 18 S. W. 260, 25 Am. St. Rep. 706; *Insurance Co. v. Pyle*, 44 Ohio St. 19, 4 N. E. 465, 58 Am. Rep. 781; *Feise v. Parkinson*, 4 Taunt. 639.

²⁰⁹ 69 Conn. 503, 38 Atl. 214, 61 Am. St. Rep. 53. See, also, *Delouche v. Insurance Co.*, 69 N. H. 587, 45 Atl. 414, in which it was held that the insured, under similar circumstances, could recover the premiums paid, less the value of the insurance, and that she was not obliged to accept a paid-up policy or reinstatement offered.

²¹⁰ *Mailhoit v. Insurance Co.*, 87 Me. 374, 32 Atl. 989, 47 Am. St. Rep. 336.

²¹¹ Vol. 2 (7th Ed.) p. 1426, § 1259.

²¹² 2 Phil. Ins. § 1839. And see general rule well stated in sections 2620-2622, Civ. Code Cal.

²¹³ *Andree v. Fletcher*, 3 T. R. 266; *Howard v. Refuge Friendly Soc.*, 54 L. T. 644.

his premiums,²¹⁴ as when the insured was ignorant of the facts which rendered the insurance illegal.²¹⁵ It is also held²¹⁶ that where one, having no insurable interest in the life insured, paid premiums in the bona fide belief, induced by the statements of the insurer, that such insurance was valid, he may recover the premiums paid despite the fact that the contract was illegal. But it is otherwise when the insured was a party to the wrong.²¹⁷

As heretofore shown, a policy issued without the consent of the life insured is void. Therefore, when a wife expends money intrusted to her for housekeeping purposes in paying premiums upon a policy taken upon the life of her husband without his knowledge or consent, the husband may, upon discovering the fraud and furnishing clear proof that the moneys paid were his own, recover from the insurer all premiums so paid, with interest thereon.²¹⁸ Such cases escape the settled rule that a person who takes embezzled funds in due course of business,

²¹⁴ In holding that an assignee could recover premiums paid upon an illegally assigned policy, the Indiana court, in *American Mut. Life Ins. Co. v. Bertram* (Ind.) 70 N. E. 258, said: "The question, then, is, had the appellee, as the assignee of the policy, under the circumstances hereinbefore stated, the right to recover the premiums and assessments paid by her on account of the supposed insurance? The general rule is that an action will not lie to recover premiums paid upon an insurance which is illegal by reason of the policy being illegal by statute, or by reason of the illegality of the adventure insured. 14 English Ruling Cas. 533; *Lowry v. Bourdieu*, 2 Dougl. 468; *Van Dyck v. Hewitt*, 1 East, 96; *Russell v. De Grand*, 15 Mass. 35; *Welsh v. Outler*, 44 N. H. 561; *Felse v. Parkinson*, 4 Taunt. 640; *Anderson v. Thornton*, 8 Ex. 425; *Waller v. Northern Assur. Co.*, 64 Iowa, 101, 19 N. W. 865; *Richards v. Marine Ins. Co.*, 3 Johns. (N. Y.) 307; *NEW YORK LIFE INS. CO. v. FLETCHER*, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934. But it is held that this rule does not apply where there has been no fraud on the part of the plaintiff, where the policy is void because of innocent misrepresentations, where the plaintiff has been induced to take out the policy by the fraud of the insurer, and is himself innocent, or where it is clear that the policy was not a wagering contract, but was taken out under a mistake in regard to the rights of the party insured. In this case it is to be borne in mind that the appellee herself did not take out the policy, but that, with the knowledge and consent of the appellant, and at its solicitation, she took an assignment of it."

²¹⁵ *Oom v. Bruce*, 12 East, 225; *Henry v. Staniforth*, 4 Camp. 270, 5 M. & S. 122. See 2 Arn. Ins. (7th Ed.) § 1255.

²¹⁶ *Hogben v. Insurance Co.*, 69 Conn. 503, 38 Atl. 214, 61 Am. St. Rep. 53.
²¹⁷ *Fisher v. Insurance Co.*, 160 Mass. 386, 35 N. E. 849, 39 Am. St. Rep. 495. Where the policy is made void by statute the parties are in pari delicto, and there can be no recovery. *Wheeler v. Association*, 102 Ill. App. 48.

²¹⁸ *Metropolitan Life Ins. Co. v. Smith*, 59 S. W. 24, 22 Ky. Law Rep. 868, 53 L. R. A. 817; *Metropolitan Life Ins. Co. v. Monohan*, 102 Ky. 13, 42 S. W. 924; *Metropolitan Life Ins. Co. v. Sehlhorst*, 53 S. W. 524, 21 Ky. Law Rep. 912; *Metropolitan Life Ins. Co. v. Trende*, 53 S. W. 412, 21 Ky. Law Rep. 909.

for value and in good faith, can hold them against the true owner.²¹⁹ For here the insurer, though perhaps taking the premiums in due course of business and in good faith, gives no value therefor, the insurance granted being void ab initio. There may be some further question as to whether the insurer issuing policies upon the lives of persons never examined or personally consulted can be said to receive premiums paid on such policies in good faith.

If, however, the husband subsequently recognizes such a policy as valid, it seems that his consent will relate back to the inception of the policy, and bar any action for the recovery of premiums.²²⁰

²¹⁹ *Overseers of Poor of Norfolk v. Bank of Virginia*, 2 Gratt. (Va.) 544, 44 Am. Dec. 399; *Commercial Nat. Bank v. Armstrong* (C. C.) 39 Fed. at page 691.

²²⁰ *Wakeman v. Metropolitan Ins. Co.*, 30 Ont. Rep. 705.

CHAPTER VII.

THE CONSENT OF THE PARTIES—CONCEALMENT.

- 87-89. General Principles.
- 90-92. What must be Disclosed.
- 93-94. When Facts Concealed are to be Deemed Material.
- 95. When Duty to Disclose Terminates.
- 96. Disclosure Rendered Unnecessary by Special Circumstances.
- 97. Facts Unknown to Insured, but Known to his Agent.

GENERAL PRINCIPLES.

- 87. The consent of the parties to the contract of insurance is vitiated not only by fraud and mistake, but also by any failure on the part of either to exercise that high degree of good faith which the peculiar relation of the parties requires.
- 88. The exercise of such good faith requires
 - (a) That each party shall disclose to the other all material facts known to him.
 - (b) That all material representations shall not only be made in good faith, but shall also be substantially true.
- 89. The parties may by agreement make any representation or any promise, however trivial, an essential part of the contract, upon the truth or performance of which the existence of the contract is made to depend. Such a representation or promise is known as a warranty.

Contracts of insurance are affected by the presence of fraud and mistake in their making in like manner as other contracts. For discussions of the rights of parties to general contracts characterized by fraud and mistake, the reader is referred to treatises on general contract law.¹ The scope of this work requires that only those principles in regard to reality of consent which are peculiar to, or have peculiar applications to, the contract of insurance, shall be discussed. The most striking of these grow out of the fact that the parties to this contract are not on equal footing in making it. The insurer must secure from the insured much of the information upon which he bases his calculations as to the character of the risk proposed, while the insured is under an equal necessity of learning from the insurer the latter's methods of conducting his business. Hence arise the obligations on the part of each to state to the other all facts material to the risk, and to make those statements correspond with the facts—to tell the whole truth, and nothing but the truth—on pain of making the contract voidable at the

¹ See Clark, *Cont. c. 7*.

option of the other party. No question of actual fraud is involved.² There may be a breach of this obligation by a party acting in perfect good faith. In fact, the condition imposed by the law is rather one of guaranty that all material information possessed by the one party has been correctly given to the other.³

There may often arise questions as to whether statements made are material or not. It is competent for the parties to settle such questions in advance, and to agree that certain statements shall be deemed material and essential conditions of the contract. Such statements become warranties. Thus arise the peculiar doctrines of concealment, representations, and warranties, which are now to be discussed.

WHAT MUST BE DISCLOSED.

- 90. In England the insured is under obligation to disclose to the insurer every material fact that is or ought to be known to the insured. The presence of a corrupt intent on the part of the insured is wholly immaterial.
- 91. In the United States the rule as stated above applies only to marine insurance. In making contracts of fire and life insurance, the insured must disclose
 - (a) All facts as to which inquiries are made.
 - (b) All other material facts, the concealment of which would amount to bad faith.
- 92. THE EFFECT of concealing a fact that should be disclosed is to render the contract voidable at the option of the injured party.

The Duty to Disclose—English Doctrine.

The original mode of underwriting marine risks at Lloyd's, as explained above, was for the applicant to submit to the different underwriters a slip containing a description of the proposed risk, which was initialed by such as chose to insure the risk as described, in such sums within a given total as each saw fit. The nature of this transaction precluded inspection of the risk by the underwriter, and compelled entire reliance upon the description as given by the insured in determining whether the risk would be assumed, and, if so, at what rate of premium. Such a course of business necessarily gave rise to the rule that the description presented by the applicant for insurance should fully and fairly set forth all the facts concerning that risk that would influ-

² *Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co.*, 115 Fed. 77, 52 C. C. A. 671. The rule as stated above is the general rule. As will be seen later, the rule in this country with regard to fire and life insurance is different.

³ For a discussion of the grounds upon which an insurance contract is held to be avoided by mere misrepresentation, see post, p. 270.

ence the underwriter in accepting or rejecting it. This rule, with the reasons upon which it rests, has been clearly stated by Lord Mansfield in the celebrated leading case of *Carter v. Boehm*,⁴ as follows: "The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured only. The underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void, because the risk run is really different from the risk understood and intended to be run at the time of the agreement."

Although *Carter v. Boehm* did not involve a marine risk, but the insurance of a fort and factory in Sumatra against capture, the rule as there laid down has ever since been accepted as a correct statement of the law as applicable to marine insurance.⁵

The rule thus reasonably established in marine insurance has, in England, after some faltering on the part of the courts and some confusion in the decisions,⁶ been extended to all other branches of insurance. Thus, in *Lindenau v. Desborough*,⁷ a life insurance case, Bayley, J., said: "I think that in all cases of insurance, whether on ships, houses, or lives, the underwriter should be informed of every material circumstance within the knowledge of the assured, and that the proper question is whether any peculiar circumstance was in fact material, and not whether the party believed it to be so."

⁴ *CARTER v. BOEHM*, 3 Burrows, 1905, at page 1909.

⁵ *Ionides v. Pender*, L. R. 9 Q. B. 531; *Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485, 1 Sup. Ct. 582, 27 L. Ed. 337; *McLanahan v. Insurance Co.*, 1 Pet. (U. S.) 170, 7 L. Ed. 98; *Moses v. Insurance Co.*, 1 Wash. C. C. 385, Fed. Cas. No. 9,872.

See, also, *Oliver v. Greene*, 3 Mass. 133, 3 Am. Dec. 96; *Burritt v. Insurance Co.*, 5 Hill (N. Y.) 189, 40 Am. Dec. 345.

⁶ In *Bufe v. Turner*, 6 Taunt. 338, it was held that the failure to disclose a fact which the jury found material to a fire risk avoided the policy, although the nondisclosure was in entire good faith. In *HUGUENIN v. RAYLEY*, 6 Taunt. 186, and *Morrison v. Muspratt*, 4 Bing. 60, the same rule was applied in cases of life insurance. In *Wheelton v. Hardisty*, 8 El. & Bl. 232, which apparently departs from the rule above laid down, the untrue statement was made by the insured and without knowledge of the assured. The language of Bayley, J., in *LINDENAU v. DESBOROUGH*, 8 Barn. & C. 586, was approved in *LONDON ASSURANCE v. MANSEL*, 11 Ch. Div. 363, decided in 1879. As to this latter case, see remarks of Mr. Justice Gray in *PHOENIX MUT. LIFE INS. CO. v. RADDIN*, 120 U. S. 183, 7 Sup. Ct. 500, 30 L. Ed. 644.

⁷ *LINDENAU v. DESBOROUGH*, 8 Barn. & C. 586.

Same—The American Doctrine.

The American rule as to concealment is the same in marine insurance as that which obtains in England. "The duty of communication, indeed, is independent of the intention, and is violated by the fact of concealment, even where there is no design to deceive."⁸

While a few of the early American decisions⁹ show a tendency to follow the English cases in applying to contracts of fire and life insurance the same strict rule as to concealment, the American courts soon recognized the fact that the reason did not accompany the rule when imported into these other branches of insurance law. Thus, in an early Ohio Case, Judge Ranney¹⁰ said: "The reason of the rule, and the policy on which it was founded, in its application to marine risks, entirely fail when applied to fire policies. In the former the subject of insurance is generally beyond the reach, and not open to the inspection, of the underwriter, often in distant parts or upon the high seas, and the peculiar perils to which it may be exposed, too numerous to be anticipated or inquired about, known only to the owners and those in their employ; while in the latter it is, or may be, seen and inspected before the risk is assumed, and its construction, situation, and ordinary hazards as well appreciated by the underwriter as by the owner. In marine insurance the underwriter, from the very necessities of his undertaking, is obliged to rely upon the assured, and has therefore the right to exact a full disclosure of all the facts known to him which may in any way affect the risk to be assumed. But in fire insurance no such necessity for reliance exists, and, if the underwriter assumes the risk without taking the trouble to either examine or inquire, he cannot very well, in the absence of all fraud, complain that it turns out to be greater than he anticipated. And so are the latest and best authorities."

⁸ *Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485, 1 Sup. Ct. 582, 27 L. Ed. 337. In *BURRITT v. INSURANCE CO.*, 5 Hill (N. Y.) 188, 40 Am. Dec. 345, Woodruff, Ins. Cas. 105, the court, per Bronson, J., said: "In marine insurance the misrepresentation or concealment by the assured of a fact material to the risk will avoid the policy, although no fraud was intended. It is no answer for the assured to say that the error or suppression was the result of mistake, accident, forgetfulness, or inadvertence. It is enough that the insurer has been misled, and has thus been induced to enter into a contract which, upon correct and full information, he would either have declined, or would have made upon different terms. Although no fraud was intended by the assured, it is nevertheless a fraud upon the underwriter, and avoids the policy."

⁹ *WALDEN v. INSURANCE CO.*, 12 La. 134, 32 Am. Dec. 116, Woodruff, Ins. Cas. 104, in which it was held that an innocent failure to disclose an attempt to burn an adjacent building avoided the policy. *Curry v. Insurance Co.*, 10 Pick. (Mass.) 535, 20 Am. Dec. 547. See, also, *Carpenter v. Insurance Co.* (per Story, J.) 1 Story, 57, Fed. Cas. No. 2,428; *Vose v. Insurance Co.*, 6 Cush. (Mass.) 42; *Fowler v. Insurance Co.*, 6 Cow. (N. Y.) 673, 16 Am. Dec. 460.

¹⁰ *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, 59 Am. Dec. 684.

In addition to the considerations thus stated as conducing to the establishment of a less rigorous rule as to concealment in fire and life insurance, the later cases have taken into account the customary practice of insurance companies in making these contracts. Property upon which insurance is sought is inspected on behalf of the insurer by an expert, who is capable of forming a much more accurate estimate of the character of the risk than is the applicant himself; and the person of an applicant for life insurance is examined by a skilled physician with such a degree of care as to make his opinion as to the health and probable duration of the life of the applicant far more reliable than that of the applicant himself. It is usual, then—especially in life insurance—to require of the applicant written answers to questions concerning the risk, the number and particularity of which are well calculated to lead the ordinary man to believe that the insurer has asked for all the information that he desired, and to assume that information in his possession not asked for by the insurer is deemed by the latter to be not material.¹¹ But such assumption must not transcend the bounds of good faith. If the applicant is aware of the existence of some circumstance which he knows would influence the insurer in acting upon his application, good faith requires him to disclose that circumstance, though unasked. Hence the American courts have come to recognize that while, in estimating the character of the proposed risk, the insurer of marine risks is under a necessity of relying absolutely upon the knowledge and good faith of the applicant, the insurer of property and life relies primarily upon the information acquired by methods of his own selection, and looks to the applicant only for good faith. Accordingly, under the American authorities, the rule may now be considered as well settled that the failure on the part of the insured to disclose any fact, though clearly material, will not avoid a fire or life policy, unless such nondisclosure was fraudulent.¹² As is the case with all other parties alleging fraud, the burden of proving a fraudulent intent in the concealment rests heavily upon the insurer, and the question is neces-

¹¹ *Gates v. Insurance Co.*, 5 N. Y. 469, 55 Am. Dec. 360; *Browning v. Insurance Co.*, 71 N. Y. 508, 27 Am. Rep. 86; *Short v. Insurance Co.*, 90 N. Y. 16, 43 Am. Rep. 138; *RAWLS v. INSURANCE CO.*, 27 N. Y. 282, 84 Am. Dec. 280.

¹² *PENN MUT. LIFE INS. CO. v. MECHANICS' SAVINGS BANK & TRUST CO.*, 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33; *Id.* 73 Fed. 653, 19 C. C. A. 316, 38 L. R. A. 33; *Wytheville Ins. Co. v. Stultz*, 87 Va. 629, 13 S. E. 77; *Mallory v. Insurance Co.*, 47 N. Y. 52, 7 Am. Rep. 410; *RAWLS v. INSURANCE CO.*, 27 N. Y. 282, 84 Am. Dec. 280; *Browning v. Insurance Co.*, 71 N. Y. 508, 27 Am. Rep. 86; *West Rockingham Mut. Fire Ins. Co. v. Sheets*, 26 Grat. (Va.) 870. See, also, *National Life Ass'n v. Hopkins' Adm'r*, 97 Va. 167, 33 S. E. 539; *CLARK v. INSURANCE CO.*, 8 How. (U. S.) 235, 12 L. Ed. 1061.

Fraudulent concealment of value of property will avoid policy. *Fireman's Fund Ins. Co. v. McGreevy*, 118 Fed. 415, 55 C. C. A. 543.

sarily for the jury.¹³ But it has been said¹⁴ that, when an "undisclosed fact is palpably material to the risk, the mere nondisclosure is itself strong evidence of a fraudulent intent. Thus, if a man about to fight a duel should obtain life insurance without disclosing his intention, it would seem that no argument or additional evidence would be needed to show the fraudulent character of the nondisclosure." So it has been declared that if any extrinsic peril existed outside of a building insured, so as to increase the risk, it would be the duty of the insured to communicate such fact, though not requested.¹⁵ Failure to disclose the fact that a previous attempt had been made to burn the building insured has been held clearly fraudulent,¹⁶ though at least one

¹³ *Daniels v. Insurance Co. (Mass.)* 12 Cush. 416, 59 Am. Dec. 192; *Levie v. Insurance Co.*, 163 Mass. 117, 39 N. E. 792; *Mutual Life Ins. Co. v. Baker*, 10 Tex. Civ. App. 515, 31 S. W. 1072; *Henn v. Insurance Co.*, 67 N. J. Law, 310, 51 Atl. 689.

But in a recent Georgia case (December, 1902), *Northwestern Mut. Life Ins. Co. v. Montgomery*, 116 Ga. 799, 43 S. E. 79, where the policy was incontestable save for fraud, the court said: "Of course, intention is generally a question for the determination of the jury; and the conduct of the parties, as showing a fraudulent intent, is generally for their consideration. But in the present case the facts were such that they could properly have made but one finding. The applicant for insurance made in his application a false statement with reference to a material matter of fact. The statement was false, within his knowledge. It was made with a view to procuring the insurance; was made deliberately, and with an agreement that it should be regarded as a warranty, and as a part of the consideration of the contract of insurance. The company had no notice of its falsity, and acted upon it to its injury. Purposely misstating this material fact, in order to induce the company, relying upon it, to enter into a contract which might prejudice its rights, would be consistent with no other intention than one to deceive the company. The intention to deceive, coupled with the other facts in the case, conclusively showed fraud, in the legal acceptance of the term. What the applicant thought or intended with reference to the consequences of his falsehood cannot be material. He is presumed to have intended the natural consequence of what he purposely and knowingly did. We are therefore of opinion that the company completely made out its defense, and that the evidence of the plaintiff was insufficient to overcome it. We are also of opinion that the court erred, under the evidence adduced, in leaving the jury free to find that there was no bad faith or intent to deceive on the part of the insured."

¹⁴ *PENN MUT. LIFE INS. CO. v. MECHANICS' SAVINGS BANK & TRUST CO.*, 72 Fed. 413, 435, 19 C. C. A. 286, 38 L. R. A. 33.

¹⁵ *CLARK v. INSURANCE CO.*, 8 How. (U. S.) 235, 250, 12 L. Ed. 1061.

Where an applicant for insurance failed to disclose the fact, known to him, that a fire was then raging in the vicinity of the property to be insured, such concealment was in bad faith, and avoided the policy. *Orient Ins. Co. v. Peiser*, 91 Ill. App. 278.

¹⁶ *WALDEN v. INSURANCE CO.*, 12 La. 134, 32 Am. Dec. 116; *Orient Ins. Co. v. Peiser*, 91 Ill. App. 278; *Bufe v. Turner*, 6 Taunt. 338. See, also, *Bebee v. Insurance Co.*, 25 Conn. 56, 65 Am. Dec. 553.

court is of a contrary opinion.¹⁷ So, if a building insured is used for some extraordinary purpose, or if business is carried on therein in some unusual manner, so that the risk is thereby enhanced, nondisclosure of such fact would be evidence of bad faith on the part of the insured.¹⁸ But a failure to disclose the existence of an incumbrance¹⁹ upon property insured, or the fact that the owner of the property is a married woman,²⁰ does not avoid the policy, in the absence of proof of a fraudulent intent.

A statement made by the insured in the application to the effect that he had therein communicated fully and fairly all facts material to the risk, or asserting that there are no other facts that should be disclosed in respect to the risk, does not enlarge the duty of the insured as to disclosures.²¹ It is still for the insured to decide upon the materiality of the fact in question, and a failure to disclose a fact known to be material would be a breach of good faith, even in the absence of such stipulation.

When no Questions are Asked.

It not infrequently happens that fire policies are issued without requiring the usual application to be filled out, and without making any inquiries of the insured as to the character of the risk. It seems to be held without dissent in this country that such a course of procedure does not change the rule as to the insured's duty to disclose material facts.²² The insured is justified in supposing that the taciturn insurer has otherwise acquired all the information he desired, and need, therefore, volunteer information on the subject of the risk only when to keep silence would be bad faith. On this point the Supreme Court of the

¹⁷ *German-American Ins. Co. v. Norris*, 100 Ky. 29, 37 S. W. 267, 66 Am. St. Rep. 324. In this case it was left to the jury to say whether the concealment was with the intent to obtain insurance fraudulently or not.

¹⁸ *CLARK v. INSURANCE CO.*, 8 How. (U. S.) 235, 12 L. Ed. 1061.

¹⁹ *HALL v. INSURANCE CO.*, 93 Mich. 184, 53 N. W. 727, 18 L. R. A. 135, 32 Am. St. Rep. 497; *Dooly v. Insurance Co.*, 16 Wash. 155, 47 Pac. 507, 58 Am. St. Rep. 26; *Union Assur. Soc. v. Nalls* (Va.) 44 S. E. 896; *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 24 S. E. 393, 53 Am. St. Rep. 846; *West Rockingham Mut. Fire Ins. Co. v. Sheets*, 26 Grat. (Va.) 854; *Manhattan Fire Ins. Co. v. Weill*, 28 Grat. (Va.) 389, 26 Am. Rep. 364.

²⁰ *Queen Ins. Co. v. Young*, 86 Ala. 424, 5 South. 116, 11 Am. St. Rep. 51.

²¹ *Louis v. Insurance Co.*, 58 App. Div. 137, 68 N. Y. Supp. 683, affirmed [1902] 172 N. Y. 650, 65 N. E. 1119. See, also, *PENN MUT. LIFE INS. CO. v. MECHANICS' SAVINGS BANK & TRUST CO.*, 72 Fed. 413, 19 C. C. A. 286, 33 L. R. A. 33; *Browning v. Insurance Co.*, 71 N. Y. 508, 27 Am. Rep. 86.

²² *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. C. 213, 15 S. E. 562; *Johnson v. Insurance Co.*, 93 Wis. 223, 67 N. W. 416. See, however, *Smith v. Insurance Co.*, 17 Pa. 253, 55 Am. Dec. 546; *Dooly v. Insurance Co.*, 16 Wash. 159, 47 Pac. 508, 58 Am. St. Rep. 29.

United States said: ²³ "We think the governing test on it must be this: It must be presumed that the insurer has, in person or by agent, in such a case, obtained all the information desired as to the premises insured, or ventures to take the risk without it, and that the insured, being asked nothing, has a right to presume that nothing on the risk is desired from him."

WHEN FACTS CONCEALED ARE TO BE DEEMED MATERIAL.

93. THE TEST of materiality is in the effect which the knowledge of the fact in question would have on the making of the contract. To be material, a fact need not increase the risk, or contribute to any loss or damage suffered. It is sufficient if the knowledge of it would influence the parties in making the contract.

94. SPECIAL INQUIRIES—Matters made the subject of special inquiry are deemed conclusively material, and the failure of an apparently complete answer to make full disclosure will avoid the policy. But an answer incomplete on its face will not defeat the policy in the absence of bad faith.

Facts to be Disclosed—Materiality.

If the knowledge of a fact would cause the insurer to reject the risk, or to accept it only at a higher premium rate, that fact is material, though it may not even remotely contribute to the contingency upon which the insurer would become liable, or in any wise affect the risk.²⁴ Thus, in the early case of *Lynch v. Hamilton*,²⁵ insurance was effected upon certain goods on board ships from the Canary Islands to London, without any disclosure to the underwriter of the fact that one of the ships carrying the goods had been reported at Lloyd's as seen at sea deep in the water and leaky. This intelligence received at Lloyd's proved to be wholly erroneous, as the ship in question was at no time during the voyage leaky or otherwise distressed, and was lost by capture. But the concealment nevertheless avoided the contract, for the

²³ *CLARK v. INSURANCE CO.*, 8 How. (U. S.), 235, at page 249, 12 L. Ed. 1061, 1066.

²⁴ *Daniels v. Insurance Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192; *Himely v. Insurance Co.*, 1 Mill. Const. (S. C.) 153, 12 Am. Dec. 623; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567; *Hardman v. Firemen's Ins. Co. (C. C.)* 20 Fed. 594; *Mulville v. Adams (C. C.)* 19 Fed. 887; *Clark v. Insurance Co.*, 40 N. H. 333, 77 Am. Dec. 721. See, also, *Columbian Ins. Co. v. Lawrence*, 2 Pet. (U. S.) 25, 7 L. Ed. 335.

The question of materiality is ordinarily for the jury. *Daniels v. Insurance Co.*, supra; *Hardman v. Insurance Co.*, supra; *Livingston v. Insurance Co.*, 6 Cranch (U. S.) 274, 3 L. Ed. 222; *Maryland Ins. Co. v. Ruden*, 6 Cranch (U. S.) 338, 3 L. Ed. 242; *PENN MUT. LIFE INS. CO. v. MECHANICS' SAVINGS BANK & TRUST CO.*, 72 Fed. 413, 19 C. C. A. 286, 33 L. R. A. 33.

²⁵ 3 Taunt. 37.

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underwriter would not have accepted the risk if the report at Lloyd's and its connection with the property to be insured had been known to him.

When Specific Inquiries Made.

As a general proposition, matters made the subject of inquiry must be deemed material, though otherwise they would not be so regarded,²⁶ and the insured is required to make full and free disclosure to questions asked.²⁷ But, by the American decisions, at least, the failure to answer a question, or to answer it fully, will not avoid a policy issued, unless the imperfect answer is of such a character as to mislead the insurer. The law on this point is clearly expressed by Mr. Justice Gray in the leading case of *Phoenix Mut. Life Ins. Co. v. Raddin*:²⁸ "Where an answer of the applicant to a direct question of the insurers purports to be a complete answer to the question, any substantial misstatement or omission in the answer avoids a policy issued on the faith of the application."²⁹ But where upon the face of the application a question appears to be not answered at all, or to be imperfectly answered, and the insurers issue a policy without further inquiry, they waive the want or imperfection in the answer, and render the omission to answer more fully immaterial.³⁰ The distinction between an answer apparently complete, but in fact incomplete, and therefore untrue, and an answer manifestly incomplete, and as such accepted by the insurers, may be illustrated by two cases of fire insurance, which are governed by the same rules in this respect as cases of life insurance. If one applying for insurance upon a building against fire is asked whether the property is incumbered, and for what amount, and in his answer discloses one mortgage, when in fact there are two, the policy issued thereupon is avoided.³¹ But if to the same question he merely answers that the property is incumbered, without stating the amount of incumbrances, the issue of the policy without further inquiry is a waiver of the omission to state the amount."³²

²⁶ *North American Fire Ins. Co. v. Throop*, 22 Mich. 146, 7 Am. Rep. 638

²⁷ *Smith v. Insurance Co.*, 49 N. Y. 211.

²⁸ *PHOENIX MUT. LIFE INS. CO. v. RADDIN*, 120 U. S. 183, 7 Sup. Ct. 500, 30 L. Ed. 644, *Woodruff, Ins. Cas.* 92, 108, *Richards, Ins. Cas.* 318.

²⁹ Citing *Cazenove v. Assurance Co.*, 29 Law J. (N. S.) 160, affirming 6 C. B. (N. S.) 437.

³⁰ Citing *CONNECTICUT MUT. LIFE INS. CO. v. LUCHS*, 108 U. S. 498, 2 Sup. Ct. 949, 27 L. Ed. 800; *Hall v. Insurance Co.*, 6 Gray (Mass.) 185; *Lorillard Fire Ins. Co. v. McCullough*, 21 Ohio St. 176, 8 Am. Rep. 52; *American Life Ins. Co. v. Mahone*, 56 Miss. 180; *Carson v. Insurance Co.*, 43 N. J. Law, 300, 39 Am. Rep. 584; *Jersey City Ins. Co. v. Carson*, 44 N. J. Law, 210; *Lebanon Mut. Ins. Co. v. Kepler*, 106 Pa. 28.

³¹ Citing *Towne v. Insurance Co.*, 7 Allen (Mass.) 51.

³² Citing *Nichols v. Insurance Co.*, 1 Allen (Mass.) 63. Further on in the opinion the court said: "The case of *LONDON ASSUR. v. MANSEL*, 11 Ch.

WHEN DUTY TO DISCLOSE TERMINATES.

95. The duty of disclosure ends with the completion of the contract. The insured need not disclose facts learned after the making of the contract, even though the policy issues subsequently.

As a corollary to the rule of materiality stated above, it follows that no information possessed by one party can be material, in the sense of requiring disclosure, unless it is possible that it may influence the other in the making of the contract. Therefore, if the contract is already complete and binding before the information in question is acquired, there can be no duty resting upon the insured to disclose it, even though the policy is yet to issue. If the insured is entitled to receive a policy, he may compel its issue, even though the loss has already occurred. Therefore it is immaterial to the insurer whether such fact is disclosed at the time of demanding the policy or not, for he has no option as to complying with the demand. This statement of the law, which is abundantly supported by authority,³³ as well as in clear accord with sound reason, is apparently in conflict with the carelessly written

Div. 363, on which the insurers relied at the argument, did not arise on a question including several interrogatories as to whether another application had been made, and with what result, and the amount of existing insurance, and in what company. But the application or proposal contained two separate questions—the first, whether a proposal had been made at any other office, and, if so, where; the second, whether it was accepted at the ordinary premium, or at an increased premium, or declined—and contained no third question or interrogatory as to the amount of existing insurance and in what company. The single answer to both questions was: "Insured now in two offices for £16,000 at ordinary rates. Policies effected last year." There being no specific interrogatory as to the amount of existing insurance, that answer could apply only to the question whether a proposal had been made, or to the question whether it had been accepted, and at what rates, or declined; and, as applied to either of those questions, it was in fact, but not upon its face, incomplete, and therefore untrue. As applied to the first question, it disclosed only some, and not all, of the proposals which had in fact been made; and, as applied to the second question, it disclosed only the proposals which had been accepted, and not those which had been declined, though the question distinctly embraced both. That case is thus clearly distinguished in its facts from the case at bar. So much of the remarks of Sir George Jessel, M. R., in delivering judgment, as implies that an insurance company is not bound to look with the greatest attention at the answers of an applicant to the great number of questions framed by the company or its agents, and that the intentional omission of the insured to answer a question put to him is a concealment which will avoid a policy issued without further inquiry, can hardly be reconciled with the uniform current of American decisions."

³³ *Cory v. Patton*, L. R. 9 Q. B. 577; *Michigan Pipe Co. v. Michigan Fire & Marine Ins. Co.*, 92 Mich. 482, 52 N. W. 1070, 20 L. R. A. 277; *Mutual Life Ins. Co. v. Thomson*, 94 Ky. 253, 22 S. W. 87; *Commercial Ins. Co. v. Hal-*

opinion of Mr. Justice Miller in *Merchants' Mut. Ins. Co. v. Lyman*.³⁴ In that case the insured claimed that a complete oral contract of insurance had been made upon a certain vessel on December 31, 1869, to extend from January 1st to April 1st, following. On January 15, 1870, he applied for and received a policy without disclosing the fact—known to him—that the vessel had been lost on January 8th. The evidence clearly showed that there was no binding parol contract made as claimed, and that the delivery of the policy when applied for on January 15th was wholly optional with the insurer, and might have been refused without liability. Consequently it is plain that the insured's duty of disclosure had not terminated at the time the policy was delivered, and that his fraudulent concealment of his knowledge of such a material fact as the vessel's loss defeated any rights he might otherwise have taken under the contract; and the court so held. But the court goes further, and seems to lay down the doctrine that such nondisclosure would have been fraudulent, even if a previous parol contract had been made, and, since the policy thus fraudulently applied for and obtained had merged all prior negotiations, evidence of the previously made parol contract was inadmissible. To quote the language of the court: "When the company came to make this instrument, they were entitled to the information which plaintiffs had of the loss of the vessel. If, then, they had made the policy, it would have bound them, and no questions would have been raised of the validity of the instrument, or of fraud practiced by the insured. On the other hand, if they had refused to make a policy, no injury would have been done to the plaintiffs, and they would then have stood on their parol contract, if they had one, and did not need a policy procured by fraudulent concealment of a material fact at the time it was executed and the premium paid. To permit the plaintiffs, therefore, to prove by parol that the contract of insurance was actually made before the loss occurred, though executed and delivered and paid for afterward, is to contradict and vary the terms of the policy in a matter material to the contract, which we understand to be opposed to the rule on that subject in the law of Louisiana, as well as at the common law." It can scarcely be true, assuming that a binding contract was made on December 31st, that there existed any further duty of disclosure on either side. The obligation of the insurer to issue and of the insured to receive a policy in accordance with their agreement had become fixed. Upon the loss of the vessel on January 8th, the liability of the insurer on the contract of insurance became fixed; and it would seem passing strange if he were discharged from

lock, 27 N. J. Law, 645, 72 Am. Dec. 379; *Keim v. Insurance Co.*, 42 Mo. 38, 97 Am. Dec. 291; *Baldwin v. Insurance Co.*, 56 Mo. 151, 17 Am. Rep. 671.

³⁴ 15 Wall. (U. S.) 664, 21 L. Ed. 246.

such liability by issuing a policy, as he was absolutely bound to do, without knowledge of the vessel's loss.

A leading English case³⁵ goes so far as to hold that the duty of the insured to communicate material facts in his knowledge terminates with a preliminary contract that is binding only as a moral obligation, by reason of a custom among underwriters. Accordingly, when the insured failed to disclose to the insurer a loss that had occurred after making such an imperfect preliminary contract, but before the execution of the policy, it was held that the concealment was not ground for avoiding the policy when issued.

DISCLOSURE RENDERED UNNECESSARY BY SPECIAL CIRCUMSTANCES.

96. The insured is under no obligation to disclose facts known to him

- (a) When such facts are known, or are reasonably believed by the insured to be known, to the insurer.
- (b) When they relate to risks expressly excepted by the policy, or excluded by warranties.
- (c) When the communication of such facts is waived by the insurer.

The circumstances of the parties to an insurance contract, or the conditions under which it is executed, may be such as to render it unnecessary, in the absence of questions requiring it, for the insured to disclose to the insurer facts that would otherwise be material. The common-law rule, as laid down by Lord Mansfield in *Carter v. Boehm*,³⁶ is thus analytically stated in the Civil Code of California:³⁷ "Neither party to a contract of insurance is bound to communicate information of the matters following, except in answer to the inquiries of the other: (1) Those which the other knows; (2) those which, in the exercise of ordinary care, the other ought to know, and of which the former

³⁵ *Cory v. Patton*, L. R. 9 Q. B. 577.

³⁶ *CARTER v. BOEHM*, 3 Burrows, 1905.

³⁷ Civ. Code, § 2564.

³⁸ In *Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485, 1 Sup. Ct. 582, 27 L. Ed. 337, the following statement from 2 Duer, Ins. 398, is quoted and approved: "The assured will not be allowed to protect himself against the charge of an undue concealment by evidence that he had disclosed to the underwriters, in general terms, the information that he possessed. Where his own information is specific, it must be communicated in the terms in which it was received. General terms may include the truth, but may fail to convey it with its proper force and in all its extent. Nor will the assured be permitted to urge, as an excuse for his omission to communicate material facts, that they were actually known to the underwriters, unless it appears that their knowledge was as particular and full as his own information. It is the duty of the assured to place the underwriter in the same situation as himself; to give to him the same means and opportunity of judging of the value of the risks; and, when any circumstance is withheld, however slight

has no reason to suppose him ignorant; (3) those of which the other waives communication; (4) those which prove or tend to prove the existence of a risk excluded by a warranty, and which are not otherwise material; and (5) those which relate to a risk excepted from the policy and which are not otherwise material."

Same—Matters which the Insurer Ought to Know.

The general principle that the insured cannot be penalized for failing to disclose what ought to be known to the insurer or his agent, unless aware that in fact it is not so known, is clear.³⁹ To hold otherwise would be to charge the insured with the default of the insurer or his agent. But the application of the principle is not so clear. In the first place, we must note that the insured cannot expect the insurer to infer from facts known to him other facts not communicated. Thus the failure of an underwriter to infer that a vessel insured by him was a notorious Confederate cruiser of the same name did not excuse the failure of the insured to communicate to him that fact.⁴⁰

The insurer must know any trade usages that may affect the risk, and likewise the laws and political conditions of other countries.⁴¹ After some vacillation among the English decisions, it has become settled that the mere fact that an item of material information has been published in "Lloyd's Lists" does not excuse the insured's failure to communicate it.⁴² So it is held that an insurer is not charged with knowledge of events or facts published in the newspapers, even though it be proved that the paper containing the information in question was

and immaterial it may have seemed to himself, that, if disclosed, would probably have influenced the terms of the insurance, the concealment vitiates the policy."

³⁹ *Buck v. Insurance Co.*, 1 Pet. (U. S.) 160, 7 L. Ed. 90; *De Longuemere v. Insurance Co.*, 10 Johns. (N. Y.) 120; *Norris v. Insurance Co.*, 3 Yeates (Pa.) 84, 2 Am. Dec. 360.

The following statement of Lord Mansfield in *CARTER v. BOEHM*, 3 Burrows, 1909, is often quoted: "The assured need not mention what the underwriter knows, what way soever he came by that knowledge, or what he ought to know or takes upon himself the knowledge of, or waives being informed of, or what lessens the risk agreed and understood to be run, or general topics of speculation, or every cause which may occasion natural perils, as the difficulty of the voyage, kind of seasons, probability of hurricanes, earthquakes, etc., or every cause which may occasion political perils, from the rupture of states, from war, and the various operations of it, upon the probability of safety from the continuance and return of peace, or from the imbecility of the enemy."

⁴⁰ *BATES v. HEWITT*, L. R. 2 Q. B. 595.

⁴¹ *Buck v. Insurance Co.*, 1 Pet. (U. S.) 160, 7 L. Ed. 90. See *Arn. Ins.* (7th Ed.) § 609 et seq., where there is a good discussion of this question. See, also, *CARTER v. BOEHM*, 3 Burrows, 1909.

⁴² *Morrison v. Insurance Co.*, L. R. 8 Exch. 197; *BATES v. HEWITT*, L. R. 2 Q. B. 595.

kept on file in the insurer's office. It must be proved that the insurer actually read that part of the paper containing the information.⁴³

The insured need not communicate public events, such as the status of a war then flagrant, the sources of his information being equally open to both parties; nor need he make known his apprehensions for the future, provided there is no concealment of facts giving rise to those apprehensions.⁴⁴

Excepted Risks.

That the insurer cannot complain of the insured's failure to disclose facts that concern only risks excepted, either expressly or by warranty, from the liability assumed under the policy, is too clear to require any citation of authority in its support. Under such circumstances, the facts are wholly immaterial. Likewise the insurer is estopped to set up in defense concealment of material facts, when he has waived communication of such facts.⁴⁵

FACTS UNKNOWN TO INSURED, BUT KNOWN TO HIS AGENT.

97. The insured is under obligation to disclose not only such material facts as are known to him, but also those facts known to his agent: Provided

- (a) It was the duty of the agent to acquire and communicate information of the facts in question; and
- (b) It was possible for the agent, in the exercise of reasonable diligence, to have made such communication before the making of the insurance contract.

Facts Known to Applicant's Agent.

In marine insurance the applicant is under obligation to communicate not only all the material facts actually known to him, but also those which, under all the circumstances of the case, ought to be known to him. Therefore the insurer is entitled to rely upon securing all the information concerning the risk which has been acquired by the agent of the insured, provided it was the duty of the agent to communicate such information to his principal, and the means of doing so were reasonably at hand. And a failure on the part of the insured to disclose such facts known to his agent, due wholly to the default of the agent,

⁴³ Of course, mere items of ordinary shipping intelligence in the public papers, and too general to lead to any particular application to the risk insured, need not be communicated. In support of the statements made in the text, see *Greene v. Insurance Co.*, 10 Pick. (Mass.) 402; *Dickenson v. Insurance Co.*, Anth. N. P. (N. Y.) 92; 1 *Arn. Ins.* (7th Ed.) p. 705, § 617.

⁴⁴ *CARTER v. BOEHM*, 3 Burrows, 1909.

⁴⁵ *PHOENIX MUT. LIFE INS. CO. v. RADDIN*, 120 U. S. 183, 7 Sup. Ct. 500, 30 L. Ed. 644, *Woodruff, Ins. Cas.* 92, 108, *Richards, Ins. Cas.* 318.

will avoid the policy, despite the perfect good faith of the insured.⁴⁶ This principle is well illustrated by the leading case of *Proudfoot v. Montefiore*.⁴⁷ An English merchant, having information from his agent at Smyrna that a cargo of madder bought for him had been shipped from that port, procured insurance upon the shipment. Shortly after the dispatch of the letter containing the information upon which the principal acted, the agent learned that the vessel was aground and the cargo lost. The agent purposely refrained from telegraphing news of the disaster to his principal, lest he should forestall the insurance. In holding that the knowledge of the agent was imputable to the principal, and the policy void for concealment, notwithstanding the innocence of the latter, Cockburn, C. J., thus clearly expressed the reason for his judgment: "Notwithstanding the dissent of so eminent a jurist as Mr. Justice Story, we are of opinion that the cases of *Fitzherbert v. Mather*,⁴⁸ and *Gladstone v. King*⁴⁹ were well decided, and that if an agent whose duty it is, in the ordinary course of business, to communicate information to his principal as to the state of a ship and cargo, omits to discharge such duty, and the owner, in the absence of information as to any fact material to be communicated to the underwriter, effects an insurance, such insurance will be void on the ground of concealment or misrepresentation. The insurer is entitled to assume, as the basis of the contract between him and the assured, that the lat-

⁴⁶ It must be borne in mind that the same principles apply to the insurer, though, in the nature of things, the question does not occur so frequently. Thus, if an insurer should effect insurance upon a vessel lost or not lost, when his agent, under a duty of disclosing to him, knew that the vessel had in fact arrived safely, the insurance would be void, and the insured would be entitled to a return of his premium. See *CARTER v. BOEHM*, 3 Burrows, 1909.

⁴⁷ *PROUDFOOT v. MONTEFIORE*, L. R. 2 Q. B. 511, Richards, Ins. Cas. 324, Woodruff, Ins. Cas. 106.

⁴⁸ *FITZHERBERT v. MATHER*, 1 Term R. 12. In this case an agent of the assured was employed to ship a cargo of oats, and to communicate the shipment to another agent, who was employed to effect an assurance. An omission on the part of the former, who had written to announce the sailing of the ship, to communicate the fact that the ship had gone ashore, which he might have done by the same post, was held fatal to the policy.

⁴⁹ 1 Maule & S. 35. In this case, which was an action on a policy on a ship, "lost or not lost," the master had neglected to notify his owners that the ship had been driven on a rock—a fact as to which, on arriving at the port of discharge, he made a protest, detailing the accident, and stating that the ship's bottom must have been chafed. The owners, in ignorance of this accident, had effected an insurance. It was held that inasmuch as the captain was bound to communicate the fact, the antecedent damage was an implied exception from the insurance, for want of such communication, and the plaintiffs could not recover the loss arising from the repairs rendered necessary by the accident. This case has been severely criticised on the ground that the entire insurance should have been avoided: See 1 Arn. Ins. (7th Ed.) pp. 663, 669, §§ 584, 585.

ter will communicate to him every material fact of which the assured has, or, in the ordinary course of business, ought to have, knowledge, and that the latter will take the necessary measures, by the employment of competent and honest agents, to obtain, through the ordinary channels of intelligence in use in the mercantile world, all due information as to the subject-matter of the insurance. This condition is not complied with where, by the fraud or negligence of the agent, the party proposing the insurance is kept in ignorance of a material fact which ought to have been made known to the underwriter, and through such ignorance fails to disclose it."

There are several earlier English cases not to be reconciled with *Proudfoot v. Montefiore*, and one American case,⁵⁰ weighted with the great name of Mr. Justice Story, and mentioned with such respect by Lord Cockburn, maintains a contrary view; but the doctrine of the English case seems to have received practically universal approval from subsequent authorities.⁵¹

An important qualification was put upon the rule as laid down in *Proudfoot v. Montefiore* by another leading English case,⁵² decided some twenty years later, upon the following facts: The plaintiffs, desiring reinsurance upon an overdue vessel, employed a firm of brokers to procure it. One of the members of this firm learned that the vessel had been lost, but did not communicate this fact to either the plaintiffs, his principals, or to the firm's London representatives, through whom a policy was procured. The following day the plaintiffs, having closed all communications with the brokers above men-

⁵⁰ *Ruggles v. Insurance Co.*, opinion by Mr. Justice Story, in 4 Mason, 47, Fed. Cas. No. 12,119. The result of this decision was affirmed in the Supreme Court (12 Wheat. 408, 6 L. Ed. 674) on the ground that by the loss of the vessel the master had ceased to be the agent of the assured.

⁵¹ *Joyce, Ins.* § 636 et seq.; 1 Arn. Ins. (7th Ed.) § 582. See *Phil. Ins.* § 549, where it is said: "But it is not merely a case where one of two parties must be prejudiced by the fraud of a third. The real question is whether one party shall be defrauded, and the other shall be entitled to the proceeds of the fraud, for the assured could not suffer by the master doing his duty in communicating information of the loss. He could only, at the most, be prevented from profiting by the master's fraud in concealing it." Prior to the decision in *PROUDFOOT v. MONTEFIORE*, Judge Duer had said: "From this review of the decisions, it certainly appears that the weight of authority is greatly in favor of the doctrine that the omission of an agent, whether proceeding from fraud or neglect, to give intelligence of a loss which he is bound to communicate, may operate as a fatal concealment. Although our first impressions may be that, where the good faith of the assured is wholly unsuspected, the rule, in its application to defeat his recovery, is harsh and inequitable, our subsequent reflections, it is not improbable, will lead us to a different conclusion, and produce the conviction that the rule is well sustained by the analogies of the law, and by cogent reasons of public policy." *Lect.* 13, p. 1, § 27, vol. 2, p. 420, Duer, Ins.

⁵² *BLACKBURN v. VIGORS*, L. R. 17 Q. B. D. 553, 12 App. Cas. 541.

tioned, and still having no knowledge of the vessel's loss, secured further insurance through another firm of brokers, who were equally ignorant of the loss. The first policy was clearly void, and the second policy was likewise held in the Court of Appeal⁵³—reversing the court below—to be avoided by the nondisclosure of the knowledge that had been acquired by the plaintiffs' former agent. But in the House of Lords⁵⁴ the judgment of the Court of Appeal was reversed on the ground that the knowledge of an agent could be imputed to a principal innocently procuring insurance only when the agent was employed for the purpose of procuring and communicating such information as that in question,⁵⁵ as in the case of the master of the vessel in *Gladstone v. King*,⁵⁶ or the purchasing agent in *Proudfoot v. Montefiore*,⁵⁷ or when the insurance was procured through the agent possessing the information.

Insurance Procured by Agent of Insured.

Insurance procured by an agent ignorant of facts that have come to the knowledge of his principal after his appointment will be valid only when the insurance had been effected before the principal, by the exercise of due and reasonable diligence, could have communicated his knowledge to his agent, or laid it before the insurer.⁵⁸ The English authorities require of the principal in such cases the utmost degree of reasonable diligence in his effort to communicate with his agent.⁵⁹

⁵³ L. R. 17 Q. B. Div. 553.

⁵⁴ 12 App. Cas. 541.

⁵⁵ See, also, *Patton v. Janney*, Fed. Cas. No. 10,836, 2 Cranch, C. C. 71.

⁵⁶ 1 Maule & S. 35.

⁵⁷ *PROUDFOOT v. MONTEFIORE*, L. R. 2 Q. B. 511.

⁵⁸ *McLanahan v. Insurance Co.*, 1 Pet. (U. S.) 170, 7 L. Ed. 98; *Snow v. Insurance Co.*, 61 N. Y. 164; *Andrews v. Insurance Co.*, 9 Johns. (N. Y.) 32; *Watson v. Delafield*, 2 Johns. (N. Y.) 526.

⁵⁹ See *PROUDFOOT v. MONTEFIORE*, L. R. 2 Q. B. 511, where it was said that the telegraph should have been used. See, also, *Grieve v. Young* (1782) Millar, Ins. 65.

CHAPTER VIII.

THE CONSENT OF THE PARTIES—REPRESENTATIONS AND WARRANTIES.

- 98-99. The Nature and Effect of Representations.
- 100. Representations as to Opinion and Belief.
- 101. Promissory Representations.
- 102-103. Construction of Representations.
- 104. Warranties—In General.
- 105. Affirmative and Promissory Warranties.
- 106-107. Warranties Distinguished from Representations.

THE NATURE AND EFFECT OF REPRESENTATIONS.

- 98. Representations are statements made to give information to the insurer,¹ and otherwise induce him to enter into the insurance contract. They may be oral or written, and may be made before or at the time of the execution of the contract.
- 99. False representations, whether innocent or fraudulent, will in all cases render a contract of insurance voidable, provided they are material, but immaterial representations are wholly without effect, save under the provisions of statutes.

As stated in the preceding sections, it becomes the duty of the person applying for insurance upon a risk of whatever kind to give to the insurer all such information concerning that risk as will be of use to him in estimating its character, and in determining whether or not to assume it. This information may be given orally and voluntarily, or it may be given in writing, in response to questions asked,² the course of business in this respect, as we have seen, very greatly varying the extent of this duty of disclosure in some branches of insurance. But however communicated, this information forms the basis of the contract as made. It describes, marks out, and defines the risk assumed. If this description, as relied on by the insurer, proves to be untrue in any material respect, the insurer may decline to be bound by the agreement, saying, "I have made no such contract." The ground of the insurer's discharge is not the fraud of the insured,

¹ Representations may also be made by the insurer to induce the insured to enter into the contract, and such representations are subject to all the rules of law to be discussed under this heading. But as the insured seldom desires to avoid the contract, the cases nearly always refer to representations made by the insured.

² "A representation may be oral or written." Civ. Code Cal. § 2571.

"A representation may be made at the same time with issuing the policy, or before it." Civ. Code Cal. § 2572.

but merely that the loss which he is called upon to indemnify occurred under a risk different from that assumed. Clearly an underwriter who has insured a steamer cannot be required to pay for the loss of a sailing vessel; nor will he, under a policy written upon a vessel represented to be safe in port, be liable for the loss of a vessel which at the time of the underwriting was at sea and storm-tossed for the simple reason that he had never insured that vessel. The insurer of a brick house is not liable for the loss of a frame house; nor is he who insures a man of thirty liable for the death of a man who was then thirty-five, even though in every other respect he may answer to the description of the person insured. But the insurer could not decline to pay for the loss of a white-painted house or ship because the one insured was described as being painted green, though otherwise identical in description with the subject of the loss.

Hence arises the reasonable and commendable rule that the untruth of any material representation relied on by the insurer in making the contract will avoid³ the contract, wholly irrespective of the character of the intent, whether innocent or fraudulent, with which such misrepresentation was made. As a complement to this rule, the authorities add that the untruth of an immaterial representation will not affect the contract, unless the representation was made fraudulently.⁴ From this statement arises an implication, which is sometimes stated in express terms,⁵ that a fraudulent misrepresentation will avoid a contract of insurance, even though wholly immaterial. It is also sometimes said that the materiality of a fraudulently made misrepresentation is conclusively presumed. It is submitted that these statements are misleading, and not in accord with the cases or the analogies of the law. It must be borne in mind that, in order that a representation shall be immaterial, it must have had absolutely no weight with the insurer in making the contract in question; it must not in the slightest degree have induced him "to enter into a contract which he would otherwise have declined, or to take a less premium than he would otherwise have demanded."⁶ If the fraudulent misrepresentation did, as a matter of fact, influence the insurer to assume the risk,

³ The word "avoid" is used in the sense in which it is ordinarily understood to apply in insurance law; i. e., render voidable at the option of the injured party, and not absolutely void.

⁴ Hazard v. Insurance Co., 8 Pet. (U. S.) 557, 8 L. Ed. 1043; Higgle v. American Lloyd's (D. C.) 14 Fed. 143; DENNISON v. INSURANCE CO., 20 Me. 125, 37 Am. Dec. 42; Continental Ins. Co. v. Kasey, 25 Grat. (Va.) 268, 18 Am. Rep. 681; ARMOUR v. INSURANCE CO., 90 N. Y. 450; McVey v. Grand Lodge, 53 N. J. Law, 17, 20 Atl. 873; Daniels v. Insurance Co., 12 Cush. (Mass.) 416, 59 Am. Dec. 192; Barteau v. Insurance Co., 67 N. Y. 595.

⁵ See PENN MUT. LIFE INS. CO. v. MECHANICS' SAVINGS BANK & TRUST CO., 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33.

⁶ Phil. Ins. § 537.

it is clear that the misrepresentation was material, and the courts may well say that the insured will not be heard to deny its materiality. But such a sound conclusion by no means justifies a general statement that the materiality of a fraudulent misrepresentation is conclusively presumed. A diligent search among the authorities fails to disclose a single case in which a contract was actually avoided because of a false representation that was really immaterial. In each case in which the rule is stated, it will be found that the fraud complained of had injuriously affected the insurer.⁷ But, by way of illustration, let us suppose it clearly proved that the owner of an ancient colonial dwelling had, with conscious falsehood, assured the insurer to whom application was made that the bricks of which the building was constructed had been brought from England, erroneously supposing that the insurer would more readily insure a dwelling believed to possess that distinction. Let us further suppose that the insurer had neither sentiment nor superstition such as would lead him to think English bricks in any respect better or less inflammable than American bricks, and that he gave no heed whatsoever to the colonial story. Could any court be induced to hold the contract avoided by the insured's harmless, though fraudulent, garrulity? Surely the general rule of law applies, that one is held responsible to another for his fraudulent misstatements only when that other has relied upon them to his prejudice.⁸

In view of these considerations, the rule as to the effect of misrepresentations should be amended to read thus: A false representation avoids a contract of insurance only when material, wholly without reference to the intent with which it is made,⁹ unless it is otherwise provided by statute.¹⁰

⁷ Examine the cases cited in note 4, supra.

⁸ In ANDERSON v. FITZGERALD, 4 H. L. Cas. 484, at page 504, Lord Chancellor Cranworth said: "Indeed, whether made bona fide or not, if it is not material, the untruth is quite unimportant. If the man on entering into the policy had said that he arrived at Dublin three days previously, whereas he had only arrived that morning, and such statement did not form part of the contract, then, though false, it would be quite immaterial." See, also, 2 Pars. Cont. 769; Clark, Cont. 344, 345.

⁹ Farmers' Ins. & Loan Co. v. Snyder, 16 Wend. (N. Y.) 481, 30 Am. Dec. 118.

In VIVAR v. SUPREME LODGE, 52 N. J. Law, 455, 20 Atl. 36, the court said: "If the representation made, though known by the insured to be false, did not differ from the truth in any respect which was, either in fact or in the view of the insurer, material to the contract, then the falsehood did not mislead the insurer or induce the contract, and should not be allowed to avoid it. Usually the materiality of a representation will be inferred from the fact that it was made pending the negotiations, in response to a specific inquiry by the insurer; but this rule is not universal, for the purpose of the

¹⁰ See note 10 on following page.

The rule just stated seems at first inconsistent with the cases involving another and somewhat different class of representations; that is, representations of opinion, belief, intention, and information, in which intent is vital. These will be separately considered in the next section.

Grounds upon Which Contract is Avoided by Misrepresentation.

There can be little doubt that the rule that insurances are avoided by misrepresentations has its origin in the general doctrine of fraud, and Mr. Arnould thought it should still be regarded as a phase of that doctrine, in order to preserve a consistent relationship with the general body of the law, and that, "although no pretense existed for alleging actual fraud, yet the policy was to be considered void on the ground of constructive or legal fraud—that is, such conduct on the part of the assured as, though it does not imply any moral turpitude in himself, yet, from the effect it has in fact of misleading the underwriter, is, in legal language, said to be fraudulent."¹¹

Inquiry must be considered, to see whether the information is sought to aid the insurer in fixing the terms on which he will contract, or with an entirely different object. Thus, if a mutual insurance company should require its premiums to be paid within a definite time after the mailing of notice addressed to the residence of the insured, and, with this rule in view, should require every applicant for insurance to state his residence in his application, and an applicant should give as his residence not the truth, but the place where he ordinarily received his mail, it would seem absurd to hold that such circumstance could invalidate the contract." The view taken in the text is approved by Arn. Ins. § 536 (7th Ed.).

¹⁰ In framing legislation intended to mitigate the harshness of the common-law rule as to warranties by transforming them into representations, the loose statement of the rule, as discussed in the text, has in many instances been incorporated in the statute. Thus in the Kentucky act we read: "Nor shall any misrepresentations, unless material or fraudulent, prevent a recovery on the policy." Ky. St. (Barbour & Carroll) c. 32, § 639. The Virginia statute is even more unsatisfactory in its statement of the rule: "No answer to any interrogatories made by an applicant for a policy of insurance shall bar the right to recover upon any policy issued upon said application, by reason of any warranty in such application or policy contained, unless it be clearly proved that such answer was willfully false, or fraudulently made, or that it was material." Acts 1899-1900, p. 55, c. 515. Statutes of similar import exist in many other states. Under the wording of these statutes, it would seem clear that a fraudulent immaterial representation will avoid the contract. See PENN MUT. LIFE INS. CO. v. MECHANICS' SAVINGS BANK & TRUST CO., 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33; Id., 73 Fed. 653, 19 C. C. A. 316, 38 L. R. A. 33, in which the effect of the Pennsylvania statute (Laws 1885, p. 134, § 1) is discussed.

¹¹ See Arn. Ins. (7th Ed.) § 535. It seems that this was the view taken by Mr. Arnould in the first edition of his work (495-498). In the second edition (vol. 1, p. 549) he took the view advanced by Judge Duer, and in the latest edition (7th [1901] § 535, vol. 1, p. 622) the editors adopt the view of Phillips as the correct one.

Judge Duer, in his interesting and acute lectures on Marine Insurance,¹² contends that a material representation is essentially a part of the contract, whether written in the policy or not, and that its untruth amounted to a breach of contract discharging the insurer. This view, however, can scarcely be correct, and was objected to by Lord Esher in *Blackburn v. Vigors*,¹³ as apt to give rise to new complications in the law.

It would seem from what is written above as to the nature of representations, and from the clear statement of Mr. Phillips¹⁴ on this point, that the true theory upon which an untrue representation of a material fact avoids an insurance, in the absence of any suspicion of fraud, is that there is implied by the sound policy of the law from the customs of underwriters a condition that the contract shall be enforceable only when all representations, on the faith of which the contract was entered into, shall be substantially in accordance with the facts.

How Representations Are Made—Oral and Written.

The very nature of representations requires that they precede the execution of the contract which they are made to induce. They may subsequently be set forth in the written contract, but, if proper representations, and not the so-called promissory representations, they do

¹² 2 Duer, Ins. 648-655.

¹³ L. R. 17 Q. B. Div. 553, 561, 12 App. Cas. 539.

¹⁴ In *BLACKBURN v. VIGORS*, L. R. 17 Q. B. Div. 553, at page 561, the following statement of the law in Phil. Ins. § 537, is approved: "The effect of a misrepresentation or concealment in discharging the underwriters does not seem to be merely on the ground of fraud, as has been usually laid down by writers on insurance, but also on the ground of a condition implied by the fact of entering into the contract, that there is no misrepresentation or concealment. Mr. Duer criticises the phraseology of the books in putting the effect of a misrepresentation or concealment upon the contract entirely upon the ground of fraud. Mr. Arnould adheres to this application of that term for the sake of consistency with the general legal doctrine that what passes between the parties preliminary to a contract is not a part of it, and should not be imported into it; and since a representation through mistake or inadvertence has the same effect, in reference to the underwriter, as an intentional and literally fraudulent misrepresentation or concealment, namely, it induces him to enter into a contract which he would otherwise have declined, or to take a less premium than he would otherwise have demanded, he deems it to be excusable to apply the term "fraud," and thus bring the doctrine on this subject nominally within the acknowledged general principle applicable to other contracts. But I cannot think that this anomalous use of the term is justifiable on this ground, since ambiguous phraseology is not to be tolerated in any science, and least of all in that of law, where it can possibly be avoided, as it may easily be in this case by stating the practical doctrine in direct terms, namely, that it is an implied condition of the contract of insurance that it is free from misrepresentation or concealment, whether fraudulent or through mistake."

not become any part thereof, because not contractual in nature. Being, therefore, merely collateral inducements to the contract, they may be communicated in any manner whatsoever that is intelligible. They may be oral, or written in papers not connected with the contract, such as circulars and prospectuses,¹⁵ or in the application or examiner's report, or they may appear in the policy itself. When statements purporting to be representations made by the insured appear for the first time in the policy as written and tendered by the insurer, it seems that they become binding upon the insured only when he accepted the policy with actual knowledge of their presence. By accepting the policy, the insured is conclusively presumed to have assented to all of its terms so far as contractual, but he will not be held to have adopted at the same time all the representations that the insurer or his agents may have endeavored to foist upon him.¹⁶

REPRESENTATIONS AS TO OPINION AND BELIEF.

100. Representations as to future conduct or events, or as to other things not susceptible of present, actual knowledge, amount only to statements of opinion, intention, or belief. As to such representations the good faith of the insured furnishes the criterion of truth, for they can be false only when the opinion, intention, or belief as stated is not honestly entertained.

The descriptive representations of previous and present conditions and past events which have been discussed above, and which are susceptible of exact knowledge and correct statement, may conveniently be termed "objective representations," as applicable to external realities. The other class of representations as to the deponent's opinion, belief, or intention, in so far as they are really representations, can, in the nature of things, set forth only a mental state, and may therefore conveniently be termed "subjective representations." Representations of this latter class cannot be descriptive in the strict sense of the word, but they may have much value to the insurer in reaching a conclusion concerning the risk. Thus the insured may express an opinion that his house is of a certain value, or that his body is wholly free from a certain disease. The insurer cannot for a moment be justified in

¹⁵ Wood v. Dwarries, 11 Exch. (Hürl. & G.) 493; Collett v. Morrison, 9 Hare, 162; Solvin v. James, 6 East, 571. But see Wheelton v. Hardisty, 8 El. & Bl. 285, 92 E. Com. Law, 231; RUSE v. INSURANCE CO., 23 N. Y. 516; Id., 24 N. Y. 653.

¹⁶ See Dooly v. Insurance Co., 16 Wash. 155, 47 Pac. 507, 58 Am. St. Rep. 26; O'Brien v. Insurance Co., 52 Mich. 131, 17 N. W. 726; HALL v. INSURANCE CO., 93 Mich. 184, 53 N. W. 727, 18 L. R. A. 135, 32 Am. St. Rep. 497; Union Assur. Soc. v. Nalls, 101 Va. 613, 44 S. E. 896; Morotock Ins. Co. v. Rodefer, 92 Va. 747, 24 S. E. 393, 53 Am. St. Rep. 846.

thinking that the value of the house is really just what the owner estimates it to be, for he must be deemed to know that the value of property is ordinarily capable of exact ascertainment only by a sale. Neither can the insurer rely upon the statement of the insured that he is free from some specific disease, the discovery of which might baffle the skill of the most experienced physician. But he is entitled to believe that the insured honestly thinks his house to be of the value stated, or that he is free from the disease mentioned.¹⁷ The insurer knows that the insured's opinion may be mistaken, but the fact that such an opinion is honestly entertained by the insured may be of great value to him in reaching a conclusion as to the risk. So an expression of an intention as to a future course of conduct with reference to property or life to be insured, if merely a representation, and not made part of the contract, can be relied on only as to the bona fide existence of such an intention in the mind of the insured. Likewise, when a statement is made as upon information of another, as between the insurer and the insured the insurer cannot rely upon the truth of the statement, but he may rely upon the fact that such information was in reality received.¹⁸

It is now apparent that all representations of this class, termed above "subjective," are statements of the fact of the existence of certain mental states. Hence the question of intent, which is immaterial in the case of objective or descriptive representations, becomes vital when the representation is subjective. Thus suppose a man who owned a building of the actual value of \$10,000, with an incumbrance thereon to the extent of \$5,000, should represent in an application for insurance, subsequently issued, that the building was worth \$15,000, and incumbered to the amount of only \$3,000. Here the representation as to the incumbrance, which is plainly material, is false, and will avoid the insurance, even though due to accident or mistake, and despite the

¹⁷ Kenton Ins. Co. v. Wigginton, 89 Ky. 330, 12 S. W. 668, 7 L. R. A. 81; Barnes v. Association, 191 Pa. 618, 43 Atl. 341, 45 L. R. A. 264; Phenix Ins. Co. v. Wilson, 132 Ind. 449, 25 N. E. 592; Supreme Ruling of the Fraternal Mystic Circle v. Crawford (Tex. Civ. App. June, 1903) 75 S. W. 844; DENISON v. INSURANCE CO., 20 Me. 125, 37 Am. Dec. 42. Where it is stated that the answers given are true to the best of the applicant's knowledge and belief, good faith is all that is required of the applicant. AETNA LIFE INS. CO. v. FRANCE, 94 U. S. 561, 24 L. Ed. 287; Clapp v. Association, 146 Mass. 519, 16 N. E. 433. See, also, BOWDEN v. VAUGHAN, 10 East, 415.

¹⁸ Tidmarsh v. Insurance Co., Fed. Cas. No. 14,024, 4 Mason, 439. "When a person insured has no personal knowledge of a fact, he may nevertheless repeat information which he has upon the subject, and which he believes to be true, with the explanation that he does so on the information of others, or he may submit the information, in its whole extent, to the insurer; and in neither case is he responsible for its truth, unless it proceeds from an agent of the insured, whose duty it is to give the intelligence." Civ. Code Cal. § 2578.

total absence of any fraudulent intent. The subject of the representation is an external fact. The statement as to the value of the house was far from being accurate, but that fact alone will not justify the insurer in declaring the insurance avoided.¹⁹ He must first show that the insured did not really think the house to be of that value; that is, that he did not, in truth, entertain the opinion he professed to hold. Put briefly, the subject of the opinion was the value of the property, but the subject of the representation was the opinion. Therefore in all of this class of representations the existence of the opinion, belief, or intention as represented is necessary to the truth of the representation. Consequently they also fall within the general rule stated above—that a false material representation renders an insurance contract voidable, whether made innocently or fraudulently.

¹⁹ In *Phenix Ins. Co. v. Pickel*, 119 Ind. 153, 21 N. E. 546; *Id.*, 119 Ind. 291, 21 N. E. 898—both in 12 Am. St. Rep. 393, the following statement of the law as laid down by Wood, Ins. pp. 568, 569, is approved: "How is value determined? Is it not a matter of judgment and opinion wholly, except, it may be, in special instances? How is the value of real estate to be estimated? What is the standard by which to ascertain the value of a building? Is it what this man or that says it is worth? Is it what it would cost to build another of the same style and materials? The ascertainment of any of these facts is a mere matter of judgment. Has not the assured the same right to exercise his judgment, if he exercises it honestly, that his neighbors on the jury have? When the insurers propound this inquiry, upon what basis and by what standard is it to be presumed they expect the insured to estimate the value? Is it reasonable to suppose that they expect him to estimate the value of the materials composing it, the cost of labor to build it, or, rather, to give his honest judgment and opinion upon the question? Suppose the question in the application to be, 'What, in your honest judgment and opinion, is the value of the property?' Would it not be held that, in order to avoid the policy, the insurer must show that the value was not given according to the honest judgment and opinion of the insured? Most certainly. And it is difficult to conceive how the introduction of the words 'judgment or opinion' into the question can affect the rights of the parties at all, for in nearly all instances the question of value is well known to be a mere matter of opinion. Particularly is this so as to buildings and real estate generally, and all the insurer expects, or has the right to expect, in answer to a question of the value thereof, is simply the honest judgment and opinion of the assured; and it is absurd to hold the assured responsible for an error of judgment honestly made, simply because his neighbors differ with him in that respect. A doctrine that held the insured up to a strictly exact valuation would be extremely unjust, and would result in vitiating one-half the policies issued, for, under the rule, the difference of one cent is as disastrous as a difference of a large amount."

PROMISSORY REPRESENTATIONS.

101. The term "promissory representation" is used in two senses—
- (a) First, it is used to indicate a parol promise made in connection with the insurance, but not incorporated in the policy. The nonperformance of such a promise cannot be shown by the insurer in defense of an action on the policy, but proof that the promise was made with fraudulent intent will serve to defeat the insurance.
 - (b) Secondly, an undertaking by the insured, inserted in the policy, but not specifically made a warranty, is also called a "promissory representation." It is, however, in such a case, merely an executory term of the contract, and not properly a representation at all.

"Promissory representation" is a loose term that has crept into insurance law, following in the train of the useful and correct expression "promissory warranty," soon to be discussed. The term is used in many different senses, in all of which it is misleading, while in some it is clearly a misnomer. Thus a usually careful writer says: ²⁰ "Only those promissory representations are available for such a purpose [to avoid a contract when bona fide] which are reduced to writing and made a part of the contract, thus becoming substantially, if not formally, warranties"—meaning thereby to state the well-known principle that a written contract cannot be affected by the terms of a prior parol agreement not contained therein. The most apparent significance of the expression "promissory representation" is that it is a representation in which a promise is made to do or to refrain from doing something. But in so far as the promise is concerned, it is plainly no representation at all.²¹ It may be enforceable as a term of the policy if properly written therein, or it may be unenforceable if not so written, by the operation of the rule of evidence forbidding the admission of parol testimony to add prior or contemporaneous terms to a written instrument. But whether such promise is enforceable or unenforceable, no question pertaining to the doctrine of representations is involved.

Another meaning is given to the expression, with more accuracy, in the statement of the rule that promissory representations never affect the contract of insurance, unless made in bad faith, however untrue they may be.²² That is, the making of a promise may amount to a representation that a certain intention is entertained by the insured.

²⁰ May, Ins. § 182.

²¹ *ALSTON v. INSURANCE CO.*, 4 Hill (N. Y.) 329.

²² *KIMBALL v. INSURANCE CO.*, 9 Allen (Mass.) 540, 85 Am. Dec. 786; *Prudential Assur. Co. v. Aetna Life Ins. Co.* (C. C.) 23 Fed. 438. See, also, *KNECHT v. INSURANCE CO.*, 90 Pa. 118, 35 Am. Rep. 641.

If the insurer relies upon the existence of that intention, and makes a contract upon the faith of it, it is clear, on principles already discussed, that he will not be bound by his agreement if it appears that the promise was made in bad faith, and that therefore the intention never existed as represented. Further, so far as the promise is merely a representation, and not a contract, the failure of the insured to carry out his bona fide intention will not avoid the contract.²³ It is also to be observed that such a prior promise may always be shown by parol, in order to prove a fraudulent inducement to the contract, even when it would be wholly inadmissible as a term of the contract. Thus let us suppose that the owner of a factory, applying for insurance thereon, in order to secure a lower premium rate, promises, within a specified time, to substitute steam heat for open fires, and electric lighting for kerosene lamps. It will be further supposed that these promises induce the insurer to issue at a lower rate a policy in which only the agreement as to the steam heating is set forth, that concerning the lights being omitted. The factory is destroyed by fire within the terms of the policy, and the insurer sets up in defense of an action brought the failure of the insured to fulfill his promises as to heating and

²³ Thus, where an applicant for insurance on a building makes an express oral promise that it shall be occupied, and a policy is thereupon delivered to him, such policy will not be avoided by his subsequent failure to fulfill such promise, unless fraud is proved, even though the risk be increased by the building being unoccupied. *KIMBALL v. INSURANCE CO.*, 9 Allen (Mass.) 540, 85 Am. Dec. 786. In this case the court, per Gray, J., said: "The case perhaps most often cited as showing that an oral promissory representation may be set up to defeat a written policy is *DENNISTOUN v. LILLIE* (1821) 3 Bligh, 202. But an examination of the facts of the case shows that the representation to the underwriters was in no sense promissory, or relating to anything after the execution of the policy. The representation was contained in a letter received and shown to the underwriters in June, which stated that the ship would sail from Nassau on the 1st of May. She had sailed on the 23d of April, and been lost on the 11th of May, so that the representation as made to the underwriters was an untrue statement of a past fact. It was so distinctly pleaded, as appears by the report of the same case in 1 Shaw, App. 23. Lord Eldon so treated it after the argument, stating the question to be 'whether it is a representation of an expectation, or a statement as of a past fact, which is material to the risk.' *DENNISTOUN v. LILLIE*, 3 Bligh, 209. In announcing his final opinion, he omitted the word 'past' before 'fact,' and said: 'There is a difference between the representation of an expectation and the representation of a fact. The former is immaterial, but the latter avoids the policy if the fact misrepresented be material to the risk.' Yet the report clearly shows that the chancellor was merely reaffirming his original opinion, and used 'fact' as past, opposed to 'expectation,' which was future, and did not intend to speak of anything in the future, which no human being could control, as a 'fact.'" See, also, what is said of *DENNISTOUN v. LILLIE* in *ALSTON v. INSURANCE CO.*, 4 Hill (N. Y.) 329, at page 338. See, also, 1 Arn. Ins. (7th Ed.) §§ 541-544.

lighting. In the first place, it is clear that the promise to install the steam heat, contained in the policy, is no representation at all, but a term of the contract, the performance of which may be made a condition of the insurer's liability. In that case the breach of the condition, if proved, will constitute a good defense. But suppose the breach of this written condition is not proved, and the insurer is forced to rely upon the nonfulfillment of the insured's oral promise to put electric lights in the factory. He cannot be allowed to show this previous parol agreement in order to prove a breach of a promissory representation.²⁴ Any such agreement formerly made was merged in the subsequently written policy, and its breach cannot be shown in order to defeat the insured's rights under the terms of the policy. But this oral promise may be shown for a different purpose; that is, to prove a representation by the insured that he had the intention of putting in electric lights. If this representation was relied on by the insurer, and was false, in that the insured had not, in good faith, entertained the intention as he had represented, the insurer would clearly be discharged. But if, in fact, the promise had been made in good faith, the subsequent failure of the insured to perform it would not be a defense for the insurer. The oral "promissory representation" may be proved for the purpose of showing that the written contract was fraudulently induced, but not for the purpose of adding a term to the contract.²⁵

²⁴ *ALSTON v. INSURANCE CO.*, 4 Hill (N. Y.) 329.

²⁵ This distinction seems to have been first taken by Lord Tenterden in *Flinn v. Tobin*, 1 Moody & Malkin, 367, 22 E. Com. Law, 336. The plaintiff, in obtaining the insurance, had told defendant that the vessel would carry only fifty tons of salt, which would put her in light ballast trim. As a matter of fact, she sailed with a cargo of one hundred and sixty tons, which was a very heavy cargo, and was lost. In an action on the policy the defense was the alleged misrepresentation. In summing up, Lord Tenterden, C. J., said: "I think the defendant in this case will not be entitled to a verdict unless he satisfy the jury that there was a fraudulent misrepresentation of the cargo which the *Andromache* was to carry. If he does so, the plaintiff cannot recover; but the mere fact of a misrepresentation, without fraud, will not be enough to prevent the plaintiff's recovering, for the contract between the parties is the policy, which is in writing, and cannot be varied by parol. No defense, therefore, which turns on showing that the contract was different from that contained in the policy, can be admitted; and this is the effect of any defense turning on the mere fact of misrepresentation, without fraud. If, however, fraud was practiced to induce the defendant, or the first underwriter, to sign the policy, no signatures so obtained can be binding. The question, therefore, is whether you think there was any willful and fraudulent misrepresentation made, for the purpose of getting the policy signed. If you are of that opinion, you will find for the defendant; if not, for the plaintiff." In *FLINN v. HEADLAM*, 9 Barn. & C. 693, Lord Tenterden instructed the jury to the same effect. In *Edwards v. Footner*, 1 Camp. 530—an earlier case—a week before the policy was signed, it was rep-

CONSTRUCTION OF REPRESENTATIONS.

102. Representations are construed liberally in favor of the insured, and are required to be only substantially true.
103. The materiality of representations is determined in accordance with the same rules previously stated as applying to concealments. In some states these rules have been modified by statute. Whether a given representation is material is ordinarily a question for the jury.

Construction of Representations—Substantial Truth Sufficient.

All the circumstances under which representations are usually made to the insurer, especially in life insurance, conspire to justify the strong tendency manifested by the courts to so construe the language of a representation as to uphold the policy, if possible, and, by holding the representation to be substantially true, preserve to an innocent insured the benefits he expected to receive under the policy. If the representation is written in the policy, the language in which it is expressed was chosen by the insurer; if in answer to an inquiry, the agent of the insurer usually phrases the answer to a question worded by the insurer. The great number and particularity of the inquiries made, and the nature of the information asked, are such that "no human being could with safety undertake to answer accurately and warrant the correctness of his answers."²⁶ Consequently the courts are vigorous in stretching the language of these representations, sometimes beyond the limits set by the lexicographers, in order to make them fit the facts to which honest but careless or ignorant applicants for insurance had applied them. Thus, in the leading case of *Union Mut. Life Ins. Co. v. Wilkinson*,²⁷ the answer, "No," was given to the question, "Has the party ever had any serious illness, local disease, or personal injury; if so, of what nature, and at what age?" The evidence showed that the insured, when a girl of fourteen, had fallen some forty feet from the top of a pecan tree, and, being taken up insensible, was con-

resented to the underwriters that she was to sail with two armed ships, and to carry ten guns and twenty-five men. "There was no evidence of any conversation upon the subject having passed between the parties either when the policy was signed, or in the intervening period." In fact, the ship sailed by herself, and carried only eight guns and seventeen men. The report does not show whether the ship had or had not sailed when the policy was signed. The only point raised or denied was whether the court could look back to the previous conversation, or must be confined to what took place at the time of subscribing the policy; and upon that Lord Ellenborough ruled that the previous conversation "must be referred to the policy, and treated as a representation which required to be substantially complied with on the part of the assured." But see the case of *Bowden v. Vaughan*, 10 East, 415.

²⁶ *Fitch v. Insurance Co.*, 59 N. Y. 557, 567, 17 Am. Rep. 372.

²⁷ 13 Wall. 222, 20 L. Ed. 617.

finied to her bed for some time, but with no permanent injury to her general health. In holding that it was for the jury to say whether this was a "serious" injury or not, the court said: "It is insisted by counsel for the defendant that, if the injury was considered serious at the time, it is one which must be mentioned in reply to the interrogatory, and that whether any further inquiry is expedient on the subject of its permanent influence on the health, is for the insurer to determine before making insurance. But there are grave and obvious difficulties in this construction. The accidents resulting in personal injuries, which at the moment are considered by the parties serious, are so very numerous that it would be almost impossible for a person engaged in active life to recall them at the age of forty or fifty years; and, if the failure to mention all such injuries must invalidate the policy, very few would be sustained where thorough inquiry is made into the history of the party whose life is the subject of insurance. There is, besides, the question of what is to be considered a serious injury at the time. If the party gets over the injury completely, without leaving any ill consequence, in a few days, it is clear that the serious aspect of the case was a mistake. Is it necessary to state the injury and explain the mistake to meet the requirement of the policy? On the other hand, when the question arises, as in this case, on a trial, the jury, and not the insurer, must decide whether the injury was serious or not. In deciding this, are they to reject the evidence of the ultimate effect of the injury on the party's health, longevity, strength, and other similar considerations? This would be to leave out of view the essential purpose of the inquiry, and the very matters which would throw most light on the nature of the injury, with reference to its influence on the insurable character of the life proposed."

The propriety of a liberal construction of representations in favor of the insured is well illustrated by the somewhat similar case of *Fitch v. American Popular Life Ins. Co.*,²⁸ in which the insured had stated that he had never had "any illness, local disease, or injury in any organ." In deciding that this representation was substantially true, despite the fact that the insured had been discharged from the army because of inflammation of the eyes, which, however, had been entirely cured before the application for the policy in suit had been made, the court said: "The president of the defendant, who appears to have been a physician, enumerates about fifty parts of the human body which come under the denomination of organs, including among others the eye, the nerves, bones, cartilages, veins, glands of the skin, etc.; and it is claimed by the defendant that an injury to or disease of any of these organs at any previous period necessarily rendered the answer given by the deceased a breach of warranty or a misrepresentation

²⁸ 59 N. Y. 557, 17 Am. Rep. 372.

which should avoid the policy. If a finger had been broken, the skin injured, or a vein cut at any period of the applicant's life, the policy would, according to this doctrine, be void."

An equally liberal construction in favor of the insured has usually been given to a representation that the insured is of correct and temperate habits. Indeed, the courts have allowed juries to render verdicts as to the truth of such a representation so greatly at variance with popular judgment in such matters as somewhat to shake the confidence of insurers, and even of some disinterested parties, in the English language as understood in the courts of law. Thus, in *Knickerbocker Life Ins. Co. v. Foley*,²⁹ the court held that a man was to be considered temperate if his habits were ordinarily temperate, even though he may have had an occasional attack of delirium tremens from exceptional overindulgence. This holding has been approved in a subsequent case³⁰ in the federal Supreme Court, and also in several state courts,³¹ but has been repudiated by the House of Lords in the case of *Thomson v. Weems*,³² in which Lord Watson, speaking of the *Foley* Case, said: "An American jury had found that a man was of temperate habits, although it had been proved at the trial that he had an attack of delirium tremens, and the court refused to disturb the verdict; the main reason assigned for that decision being a statement occurring in some treatise on medical jurisprudence to the effect that, in the case of an intemperate man, delirium tremens is occasioned by abstinence from drink, and in the case of a temperate man by indulgence in liquor. Even if it had been laid down as a matter of law, I should hesitate very much to adopt such a standard as that. A man suffering from delirium tremens occasioned by recent drinking may possibly be more temperate than another man who is similarly afflicted in consequence of his having abstained from his usual potations; but I should not like to affirm that either of them was, in the ordinary sense of the term, a man of temperate habits."

The most reasonable and satisfactory statement of the law on this point is, perhaps, to be found in an Ohio case, in which the court said:³³ "Where the general habits of a man are either abstemious or

²⁹ 105 U. S. 350, 26 L. Ed. 1055.

³⁰ *Northwestern Mut. Life Ins. Co. v. Muskegon Nat. Bank*, 122 U. S. 501, 7 Sup. Ct. 1221, 30 L. Ed. 1100. See, also, *Aetna Life Ins. Co. v. Davey*, 123 U. S. 739, 8 Sup. Ct. 331, 31 L. Ed. 315.

³¹ *MUTUAL LIFE INS. CO. v. SIMPSON* (Tex. Civ. App.) 28 S. W. 837. See, also, *Van Valkenburgh v. Insurance Co.*, 70 N. Y. 605.

³² *THOMSON v. WEEMS*, 9 App. Cas. 671 (1884), *Richards, Ins. Cas.* 339.

His lordship, however, was mistaken in saying that the decision of *Knickerbocker Life Ins. Co. v. Foley*, supra, merely resulted in a refusal to set aside a verdict. The question before the court was the correctness of the instruction given by the lower court.

³³ *UNION MUT. LIFE INS. CO. v. REIF*, 36 Ohio St. 596, 38 Am. Rep. 613.

temperate, an occasional indulgence to excess does not make him a man of intemperate habits. But if the habit is formed of drinking to excess, and the appetite for liquor is indulged to intoxication, either constantly or periodically, no one will claim that his habits are temperate, though he may be duly sober for longer or shorter periods in the intervals between the times of his debauches."

Representations Need be Only Substantially True.

These cases are also illustrations of the general rule that representations are not required to be literally true, as are warranties, but that substantial truth only is necessary. An old English case³⁴ further illustrates this. The armament of the vessel insured was represented as consisting of twelve guns and twenty men, whereas the real armament was of equal strength with that represented, but not identical with it. It was held that there was no misrepresentation, though it would have been otherwise if the statements had been made warranties.

Statements of Opinion, etc.

As heretofore shown,³⁵ the statement of an erroneous opinion, belief, or information, or of an unfulfilled intention, will not avoid the contract of insurance, unless fraudulent. Hence the courts are inclined to construe a statement as being one of opinion whenever it is possible to do so, in order to prevent the forfeiture of policies by reason of innocent mistakes. Thus statements of value, as already said, are held but expressions of opinion; and so are representations as to the health of the insured, so far as latent diseases are concerned,³⁶

³⁴ *PAWSON v. WATSON*, Cowp. 785. Where there is a representation that the ship will sail in ballast, such representation is sufficiently complied with by her sailing with one trunk of merchandise and ten kegs of powder. *Suckley v. Delafield*, 2 Caines (N. Y.) 222. The description in the representation may differ very considerably from the actual state of the property insured; if such variation did not in fact affect the rate of insurance, or change the actual risk, the policy is not avoided. *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567.

³⁵ Supra, p. 272.

³⁶ *MOULOR v. INSURANCE CO.*, 111 U. S. 335, 4 Sup. Ct. 466, 28 L. Ed. 447; *Goucher v. Association (C. C.)* 20 Fed. 596, and note; *Schwarzbach v. Union*, 25 W. Va. 622, 52 Am. Rep. 227; *Endowment Rank Knights of Pythias v. Rosenfeld*, 92 Tenn. 508, 22 S. W. 204; *Endowment Rank Knights of Pythias v. Cogbill*, 99 Tenn. 28, 41 S. W. 340.

See, also, as to representations and warranties of health of insured when he has an undiscovered disease, note to *Fidelity Mut. Life Ass'n v. Jeffords*, 53 L. R. A. 193.

In *MOULOR v. INSURANCE CO.*, supra, the court, by Mr. Justice Harlan, said: "If those who organize and control life insurance companies wish to exact from the applicant, as a condition precedent to a valid contract, a guaranty against the existence of diseases, of the presence of which in his system he has and can have no knowledge, and which even skillful physi-

although there is some authority to the contrary.³⁷ But if the insured represents himself to be free from a specific disease, with which he knows he is really afflicted, though not in such a serious form as to disable him, the untruth of the statement will avoid his policy.³⁸ So generally, a representation as to any future event or condition over which the insured has no control will be deemed a mere expression of opinion, which will avoid the contract only when made in bad faith.³⁹ And even a representation written in the policy in such form as to admit of its being construed as an executory agreement or "promissory

claims are often unable, after the most careful examination, to detect, the terms of the contract must be so clear as to exclude any other conclusion. * * * If it be said that an individual could not be afflicted with the diseases specified in the application [scrofula, asthma, and consumption] without being cognizant of the fact, the answer is that the jury would in that case have no serious difficulty in finding that he had failed to communicate to the company what he knew or should have known was material to the risk, and that consequently, for want of fair and true answers, the policy was, by its terms, null and void. But whether a disease is of such a character that its existence must have been known to the individual afflicted with it, and therefore whether an answer denying its existence was or not a fair and true answer, is a matter which should have been submitted to the jury."

In *Endowment Rank Knights of Pythias v. Rosenfeld*, supra, the court said: "A man cannot, however, know with such exact certainty the condition of his system as he can the status and condition of his property. The presence or absence of any disease, or predisposition to disease, is to some extent a matter of opinion. There may be hidden or undeveloped disease, of which an applicant for insurance may be wholly ignorant, and of which he may or may not have the slightest suspicion, and which may or may not be ascertained by an examiner upon his medical examination. This cannot be said of his property. A man may always know or ascertain the condition and status of his property. While the rule is the same in both cases, the application, from the very nature of the case, must be to some extent different. If the assured, when he makes his application, know, or have any reason or ground to believe, that he has any disease, even though it may be latent and undeveloped, he is in duty bound to make it known, whether specially questioned or not, and, if he fail to do so, it will amount to a misstatement or concealment, as the case may be, that will avoid his policy; but if there should be in him some latent disease, of which he knows and suspects nothing, and has no means of ascertaining, he cannot be said to have either misrepresented or concealed the facts in such a sense as to avoid his policy. There can be no concealment of a fact which is not known, and cannot be known by proper inquiry." See, also, *Royal Neighbors of America v. Wallace* (Neb. 1904) 99 N. W. 256.

³⁷ *MAINE BENEFIT ASS'N v. PARKS*, 81 Me. 79, 16 Atl. 339, 10 Am. St. Rep. 240. See, also, *CAMPBELL v. INSURANCE CO.*, 98 Mass. 381; *Vose v. Insurance Co.*, 6 Cush. (Mass.) 42.

³⁸ *Jeffrey v. United Order*, 97 Me. 176, 53 Atl. 1102.

³⁹ *Herrick v. Insurance Co.*, 48 Me. 558, 77 Am. Dec. 244, where it was held that the statement that a building would be occupied by a tenant was a mere statement of opinion.

representation" will rather be construed, when possible, as an affirmative representation of a present fact, in order to save a policy from forfeiture. Thus, when the insured states that the building is used for a certain purpose,⁴⁰ or that no smoking is allowed⁴¹ on the premises, the truth of the representation at the time it is made is sufficient to validate the insurance, which will not be affected by a subsequent change in the use to which the building is put, or in the practice as to smoking on the premises.

But where the subject of the representation is susceptible of actual knowledge the insured cannot escape the fatal consequences of an untrue statement of fact by claiming that his honestly entertained opinion on the subject was mistaken.⁴² Thus, whether a man is temperate or

⁴⁰ *Bryan v. Insurance Co.*, 8 W. Va. 605; *Burlington Ins. Co. v. Brockway*, 138 Ill. 644, 28 N. E. 799; *Joyce v. Insurance Co.*, 45 Me. 168, 71 Am. Dec. 536; *Cumberland Valley Mut. Protection Co. v. Douglas*, 58 Pa. 419, 98 Am. Dec. 298. In a policy of insurance on sundry buildings, they were described as barns, to which this clause was added: "All the above-described barns are used for hay, straw, grain unthreshed, stabling, and shelter"; and on the trial, after proof of a loss, it appeared that on the day preceding the night of the fire the insured had caused about two bushels of lime and six or eight pails of water to be placed in a tub standing in a room generally used for keeping therein unthreshed corn, in one of the barns, for the purpose of preparing the lime for rolling in it some wheat which he was about to sow upon his farm; that a short time previous to the fire he had commenced the painting of his house, and his painter had mixed his paints in the same room, and at the time of the fire there were in it an oil barrel, containing about a gallon of oil, and a pot with about a pint of mixed paint; that in another building, described in the policy as used in part as a cider mill, the insured, before and after the execution of the policy, had been in the habit of repairing his farming utensils, and had also made in it a beehive, and planed some boards for a room in his house, but a day or two before the fire the building had been cleaned out, leaving nothing in it but some apples. Held that the clause relating to the use of the buildings insured was not an agreement that they should be used in that manner, and in no other, but was inserted merely for the purpose of designating the buildings insured, and not to limit their use, or to deprive the insured of the enjoyment of his property in the same manner as buildings of that description are generally used and enjoyed. *Billings v. Insurance Co.*, 20 Conn. 139, 50 Am. Dec. 277. In *Catlin v. Insurance Co.*, Fed. Cas. No. 2,522, 1 Sumn. 434, the house was described in the policy as "at present occupied as a dwelling house, but to be occupied hereafter as a tavern, and privileged as such"; and it was held that this was not a warranty that the house should, during the continuance of the risk, be constantly occupied as a tavern, but that it was, at farthest, a mere representation of the intention to occupy it as such, and a license or privilege that it might be so occupied.

⁴¹ This is true even where the answer to the question, "Is smoking allowed on the premises?" is made a warranty. *HOSFORD v. INSURANCE CO.*, 127 U. S. 399, 8 Sup. Ct. 1199, 32 L. Ed. 196.

⁴² "When the insurer is induced to enter into the contract through a misapprehension as to a material matter occasioned by the conduct or declarations of the opposite party, he is entitled to be relieved, whether the misap-

intemperate is a question of fact, however difficult of legal definition that fact may be. Consequently, if the insured was in fact intemperate, whether drinking to excess daily, or only at long intervals, his policy cannot be saved from avoidance according to its terms by showing that the insured really regarded his habits as being correct and temperate.⁴³

Time to Which Representations Refer.

Representations refer only to the time of making the contract. As shown above,⁴⁴ statements promissory of conditions to exist subsequent to the completion of the contract may be conditions or warranties. They cannot be representations. Hence conditions represented as existing must be so during the making of the contract, but not afterwards. And representations found to be untrue may be withdrawn prior to the completion of the contract, but not afterwards.⁴⁵

Materiality—Statutes—Evidence.

The rule heretofore discussed⁴⁶ as determining the materiality of concealments applies equally to representations; that is, any statement is material which in any wise induced the insurer to make a contract which he otherwise would not have made, or would have made only on different terms.⁴⁷ In many states, however, this rule has been somewhat narrowed by statute. Thus in Massachusetts⁴⁸ it has been enacted that "no oral or written misrepresentation made in the negotiation of a contract or policy of insurance by the assured, or in his behalf, shall be deemed material, or defeat or avoid the policy, or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter misrepresented or made a warranty increased the risk of loss." The Missouri statute⁴⁹ goes still further, and, in effect, provides that a representation shall not be

prehesion be produced by fraud or innocent mistake." *Continental Ins. Co. v. Kasey*, 25 Grat. (Va.) 268, 18 Am. Rep. 681.

⁴³ *THOMSON v. WEEMS*, 9 App. Cas. 671; *Richards, Ins. Cas.* 339; *Standard Life & Accident Ins. Co. v. Lauderdale*, 94 Tenn. (10 Pickle) 635, 30 S. W. 732.

⁴⁴ *Supra*, p. 275.

⁴⁵ "A representation may be altered or withdrawn before the insurance is effected, but not afterwards." *Civ. Code Cal.* § 2576.

⁴⁶ *Supra*, p. 257.

⁴⁷ "The materiality of a representation is determined by the same rule as the materiality of a concealment." *Civ. Code Cal.* § 2581.

⁴⁸ St. 1895, c. 271. For the history of this act, see *White v. Society*, 163 Mass. 108, 39 N. E. 771, 27 L. R. A. 398, and cases cited. See, also, *Levie v. Insurance Co.*, 163 Mass. 117, 39 N. E. 792. The Minnesota act is similar in terms, with the omission of the words "or made a warranty" inserted by the act of 1895. See *Minnesota Laws 1895*, p. 400, c. 175, § 20.

⁴⁹ *Rev. St. 1879*, § 5976. See *Franklin Life Ins. Co. v. Galligan* (March, 1903) 71 Ark. 295, 73 S. W. 102.

deemed material unless it contributes to the loss or damage for which indemnity is claimed. The provisions of such statutes prevail over the express agreement of the parties.⁵⁰ "It is as much the duty of the courts to enforce such rules as it is to administer the statute of frauds and perjuries."⁵¹

The materiality of any given representation is for the jury, but the fact that a statement is made in response to an inquiry raises a powerful presumption that it is material.⁵² And the burden of proving both the materiality and the falseness of a representation rests upon the insurer.⁵³

By the great weight of authority, both in England and this country, experts in insurance will not be permitted to testify as to whether any particular representation is material, but they may state to the jury usages of insurers generally as to rejecting risks or accepting them only at a higher rate, when informed of the fact in question.⁵⁴

WARRANTIES—IN GENERAL.

104. A warranty is a representation or promise set forth in the policy, or by reference incorporated therein, which by the terms of the policy is made an essential part of the contract, and the untruth or nonfulfillment of which, it is agreed, shall render the policy voidable by the insurer, wholly irrespective of the materiality of such representation or promise.

It is generally agreed by the parties to the contract of insurance that certain representations or promises contained in the policy itself, or incorporated in it, by an express condition of the policy, shall constitute warranties, upon the truth or fulfillment of which shall depend all rights of the insured in the policy. Stipulations of this character are necessary for the protection of the insurer, who is thereby relieved

⁵⁰ *Fidelity Mut. Life Ass'n v. Miller*, 92 Fed. 63, 34 C. C. A. 211; *Fidelity Mut. Life Ass'n v. Ficklin*, 74 Md. 172, 21 Atl. 690, 23 Atl. 197; *Hermany v. Association*, 151 Pa. 17, 24 Atl. 1064; *Lutz v. Insurance Co.*, 186 Pa. 527, 40 Atl. 1104. The case of *Farmers' & Drovers' Ins. Co. v. Curry*, 13 Bush (Ky.) 312, 26 Am. Rep. 194, which is opposed to the text, was apparently overruled by *Germania Ins. Co. v. Rudwig*, 80 Ky. 223.

⁵¹ *Hermany v. Association*, 151 Pa. 17, 24 Atl. 1064, per Sterrett, J. This statement does not apply, however, to statutes of a foreign state. *Mutual Life Ins. Co. v. Hill*, 193 U. S. 551, 24 Sup. Ct. 538, 48 L. Ed. 788.

⁵² *VIVAR v. KNIGHTS OF PYTHIAS*, 52 N. J. Law, 455, 20 Atl. 36.

⁵³ *Piedmont & A. Ins. Co. v. Ewing*, 92 U. S. 377, 23 L. Ed. 610; *PENN MUT. LIFE INS. CO. v. MECHANICS' SAV. BANK & TRUST CO.*, 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33; *Jones v. Insurance Co.*, 61 N. Y. 79.

⁵⁴ For a full and learned discussion of all the English and American cases on this interesting question, see the able and carefully written opinion of Taft, J., in *PENN MUT. LIFE INS. CO. v. MECHANICS' SAV. BANK & TRUST CO.*, 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33.

from any liability which he might otherwise sustain through the assumption of hazardous risks, which, but for the false statements or promises of the applicant, would have been promptly rejected.

Representations or promises which it is thus agreed shall constitute warranties are usually those of such a character as to be manifestly material to the risk assumed, but their materiality is to be determined solely by the parties to the contract, who may, if they see fit, agree that an apparently trivial statement shall constitute a warranty. When it can be clearly seen that such was their intention, the courts will consider no further the question of its materiality, but will hold its untruth a good defense to an action on the policy.⁵⁵ As is well stated in the leading case of *Jeffries v. Economical Mut. Life Ins. Co.*:⁵⁶ "Many cases may be found which hold that, where false answers are made to inquiries which do not relate to the risk, the policy is not necessarily avoided, unless they influenced the mind of the company, and that whether they are material is a question for the jury. But we know of no respectable authority which so holds, where it is expressly covenanted as a condition of liability that the statements and declarations made in the application are true, and when the truth of such statements forms the basis of the contract."

In order to constitute a stipulation a warranty, however, it must not only be clearly shown that the parties intended it as such,⁵⁷ but it

⁵⁵ *Ripley v. Insurance Co.*, 30 N. Y. 136, 86 Am. Dec. 362; *Davey v. Insurance Co. (C. C.)* 20 Fed. 482; *Metropolitan Life Ins. Co. v. Rutherford*, 98 Va. 195, 35 S. E. 361; *Hoose v. Insurance Co.*, 84 Mich. 309, 47 N. W. 587, 11 L. R. A. 340; *Germier v. Insurance Co.*, 109 La. 341, 33 South. 361; *Kelly v. Clearing Co.*, 113 Ala. 453, 21 South. 361. "When once it is ascertained that the statement is a warranty, and that it is false and the policy expressly provides for a forfeiture in that event, the contract must be so enforced, although it concerns a matter of slight importance and may not in any manner seriously affect the risk." *Hutchison v. Insurance Co. (Tex. Civ. App.)* 39 S. W. 325; *Cobb v. Association*, 153 Mass. 176, 26 N. E. 230, 10 L. R. A. 666, 25 Am. St. Rep. 619; *JEFFRIES v. INSURANCE CO.*, 22 Wall. (U. S.) 47, 22 L. Ed. 833; *ÆTNA LIFE INS. CO. v. FRANCE*, 91 U. S. 510, 23 L. Ed. 401; *Flippen v. Insurance Co.*, 30 Tex. Civ. App. 362, 70 S. W. 787.

It is held in a recent Illinois case that, where a landlord enters into a contract of insurance providing that no gasoline except that contained in the reservoir of a gasoline stove shall be kept within the building, it is his duty to see to it that the provisions of the policy are not violated, even by the tenant, and, in case the tenant violates such provision, the insurer is not liable. *Thuringia Ins. Co. v. Norwaysz*, 104 Ill. App. 390. See, further, as to what will be construed as amounting to a breach of warranty, *Henn v. Insurance Co.*, 67 N. J. Law, 310, 51 Atl. 689.

⁵⁶ *JEFFRIES v. INSURANCE CO.*, 22 Wall. (U. S.) 47, 22 L. Ed. 833. See, also, *ÆTNA LIFE INS. CO. v. FRANCE*, 91 U. S. 510, 23 L. Ed. 401.

⁵⁷ Descriptive phrases will be considered warranties if used to describe the risk itself, but not if used merely for purposes of identifying the subject

must also form a part of the contract, itself.⁵⁸ If the representations or promises which are regarded as warranties are not contained in the policy itself, but in some other instrument, such as the by-laws, application, or survey, they can only be incorporated in the contract, so as to be given the effect of warranties, by an express condition contained in the policy.⁵⁹ Mere reference, alone, is not sufficient to give them this effect.⁶⁰

Nature of a Warranty.

Warranties are in the nature of conditions precedent, in that upon a strict compliance with them in every particular depend all rights of

of the insurance. Thus, where the vessel insured was described as "the good American ship called Rodman," it was held that the ship was warranted to be American. *Barker v. Insurance Co.*, 8 Johns. (N. Y.) 307, 5 Am. Dec. 339. So where the vessel was described as "the Mount Vernon, an American ship." *Baring v. Claggett*, 3 Bos. & P. 201, 5 East, 398. See, also, *Lewis v. Thatcher*, 15 Mass. 431. But calling a vessel by an English translation of her Spanish name is not a warranty that she is English. *OLAPHAM v. COLOGAN*, 3 Camp. 382. In *Le Mesurier v. Vaughan*, 6 East, 382, a statement that the goods insured were shipped in the vessel "called the American ship President" was held not to be a warranty that the ship was American, but merely a statement of her name.

In the leading case, *BURLEIGH v. INSURANCE CO.*, 90 N. Y. 220, Richards, Ins. Cas. 350, a description of the building insured as "detached at least one hundred feet" was held to warrant that the building was distant at least one hundred feet from any other building of such character as would increase the risk. See, also, *Wall v. Insurance Co.*, 7 N. Y. 370.

⁵⁸ *Daniels v. Insurance Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567; *GODDARD v. INSURANCE CO.*, 67 Tex. 69, 1 S. W. 906, 60 Am. Rep. 1. The fact that representations are made a part of the contract does not, however, necessarily make them warranties. They will only be given the effect of warranties, when it is manifest from an examination of the entire policy that such was the intention of the parties. *VIVAR v. KNIGHTS OF PYTHIAS*, 52 N. J. Law, 455, 20 Atl. 36; *Supreme Council of Royal Arcanum v. Brashers*, 89 Md. 624, 43 Atl. 866, 73 Am. St. Rep. 244; *Hoose v. Insurance Co.*, 84 Mich. 309, 47 N. W. 587, 11 L. R. A. 340; *MOULOR v. INSURANCE CO.*, 111 U. S. 335, 4 Sup. Ct. 466, 28 L. Ed. 447; *Fitch v. Insurance Co.*, 59 N. Y. 557, 17 Am. Rep. 372.

⁵⁹ Printed proposals to be construed as warranties should be referred to by the policy, which should in express terms declare that it had been made and accepted in reference to them. *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567.

For cases in which applications were held incorporated in the policy, so that statements contained in them constituted warranties, see *Chaffee v. Insurance Co.*, 18 N. Y. 376; *Bobbitt v. Insurance Co.*, 66 N. C. 70, 8 Am. Rep. 494. See, also, *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 19, 54 Am. Dec. 309, where statements contained in a survey were given a like construction.

⁶⁰ *SNYDER v. LOAN CO.*, 13 Wend. (N. Y.) 92; *TAYLOR v. INSURANCE CO.*, 120 Mass. 254; *Lebanon Mut. Ins. Co. v. Losch*, 109 Pa. 100; *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, 59 Am. Dec. 684.

the insured in the policy.⁶¹ They differ from such conditions, however, in that where the insured seeks to recover on the policy he need not set forth the warranties and recite his compliance with each; but by the weight of authority it is held that, in order to defeat a recovery on the ground of a breach of warranty, it is incumbent upon the defendant to allege breaches, and to prove them as alleged.⁶²

The reason for this exception to the general rule regarding the burden of proof in cases where the performance of certain stipulations is a necessary condition precedent to the right of action may be gathered from the opinion of Mr. Justice Miller in *Piedmont & A. Life Ins. Co. v. Ewing*,⁶³ where it is said: "The number of the questions now asked of the assured in every application for a policy, and the variety of subjects and length of time which they cover, are such that it may be safely said that no sane man would ever take a policy if proof to the satisfaction of a jury of the truth of every answer were made known to him to be an indispensable prerequisite to payment of the sum secured; that proof to be made only after he was dead, and could render no assistance in furnishing it. On the other hand, it is no hardship that, if the insurer knows or believes any of these state-

⁶¹ *FOWLER v. INSURANCE CO.*, 6 Cow. (N. Y.) 673, 16 Am. Dec. 460; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567; *Alabama Gold Life Ins. Co. v. Johnston*, 80 Ala. 467, 2 South. 125, 59 Am. Rep. 816; *Metropolitan Life Ins. Co. v. Rutherford*, 98 Va. 195, 35 S. E. 361; *Price v. Insurance Co.*, 17 Minn. 497 (Gil. 473), 10 Am. Rep. 166.

See, to the contrary, a dictum of Judge Mitchell to the effect that a warranty is in the nature of a defeasance, rather than a condition precedent. *CHAMBERS v. INSURANCE CO.*, 64 Minn. 495, 67 N. W. 367, 58 Am. St. Rep. 549.

⁶² *Piedmont & A. Life Ins. Co. v. Ewing*, 92 U. S. 377, 23 L. Ed. 610. See, also, *PENN MUT. LIFE INS. CO. v. MECHANICS' SAV. BANK & TRUST CO.*, 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33; *Jones v. Insurance Co.*, 61 N. Y. 79; *O'Connell v. Knights of Damon*, 102 Ga. 143, 28 S. E. 282, 66 Am. St. Rep. 159.

"If a life insurance policy provides that the application for insurance shall be a part of the policy, and that if any false or fraudulent representation, statement, or warranty is made in such application the policy shall be null and void, the burden of proof is on the insurer to allege and show the falsity of such representations or statement, and he must allege specifically which of the representations he claims to be false, and he is limited in his proof to those alleged." *CHAMBERS v. INSURANCE CO.*, 64 Minn. 495, 67 N. W. 367, 58 Am. St. Rep. 549, *Elliott, Ins. Cas.* 121, *Woodruff, Ins. Cas.* 124, disapproving a dictum in *Price v. Insurance Co.*, 17 Minn. 497 (Gil. 473), 10 Am. Rep. 166, to the effect that warranties are conditions precedent, the truth of which must be pleaded and proved by the assured. There is authority, however, for the view taken by the court in the earlier case. *McLoon v. Insurance Co.*, 100 Mass. 472, 97 Am. Dec. 116, 1 Am. Rep. 129; *Sweeney v. Insurance Co.*, 19 R. I. 171, 36 Atl. 9, 38 L. R. A. 297, 61 Am. St. Rep. 751.

⁶³ 92 U. S. 377, 23 L. Ed. 610.

ments to be false, he shall furnish the evidence on which that knowledge or belief rests. He can thus single out the answer whose truth he proposes to contest, and, if he has any reasonable grounds to make such an issue, he can show the facts on which it is founded."

AFFIRMATIVE AND PROMISSORY WARRANTIES.

105. Warranties are affirmative or promissory in accordance with whether they represent facts as existing at the time they are made, or promise that certain things shall be done or that specified conditions shall exist during the currency of the policy.

Warranties are affirmative or promissory according as they are made concerning an existing fact or state of facts, or relate to the existence or nonexistence of certain conditions in the future.⁶⁴ The untruth of an affirmative warranty will prevent the insured from ever acquiring any rights in the policy.⁶⁵ A promissory warranty, however, as relating solely to the future, is in the nature of a subsequent condition of defeasance, the nonfulfillment of which renders the policy voidable.⁶⁶

The language used by the parties and the nature of the risk assumed in each case will usually prevent any difficulty in determining whether the insured intends a certain statement as a representation of an exist-

⁶⁴ *O'NIEL v. INSURANCE CO.*, 3 N. Y. 122; *Smith v. Insurance Co.*, 32 N. Y. 399; *Gilliat v. Insurance Co.*, 8 R. I. 282, 91 Am. Dec. 229; *Schultz v. Insurance Co. (C. C.)* 6 Fed. 672.

But the parties must have clearly intended to promise the existence of the specified conditions. A mere expression of intention is not enough. See *Grant v. Insurance Co.*, 15 Moore, P. C. 515; *Benham v. United, etc., Co.*, 7 Exch. 744; *Catlin v. Insurance Co.*, 1 Sumn. 434, Fed. Cas. No. 2,522. But see *Bilbrough v. Insurance Co.*, 5 Duer (N. Y.) 587; *Ripley v. Insurance Co.*, 30 N. Y. 136, 86 Am. Dec. 362. In accordance with the general rule of construction as to warranties, a promissory term of the policy will not be considered a warranty unless clearly made so. And the breach of such a promissory term, not a warranty, will not avoid the contract, though it may give rise to an action for damages. *Commercial Mut. Acc. Co. v. Bates*, 176 Ill. 194, 52 N. E. 49. The law is thus stated in *Civ. Code Cal.* § 2608: "A statement in a policy which imports that it is intended to do or not to do a thing which materially affects the risk is a warranty that such act or omission shall take place." It is not believed that this is a correct statement of the common-law rule. See *Catlin v. Insurance Co.*, 1 Sumn. 434, Fed. Cas. No. 2,522; *Barb. Ins.* § 66.

⁶⁵ See cases cited supra, note 55.

⁶⁶ *Schultz v. Insurance Co. (C. C.)* 6 Fed. 672; *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 19, 54 Am. Dec. 309.

A mere declaration of future expectation or intention, as distinguished from an actual promise, is not a warranty. *Herrick v. Insurance Co.*, 48 Me. 558, 77 Am. Dec. 244; *KNECHT v. INSURANCE CO.*, 90 Pa. 113, 35 Am. Rep. 641.

ing fact, or a promise for the future. Unless the latter is clearly shown to have been intended, the courts will presume that the warranty is merely affirmative.⁶⁷ As it is well stated in the opinion of the court in *Smith v. Mechanics' & Traders' Fire Ins. Co.*: "If an insurance company desires to protect itself by a warranty as to future or continued use in the same manner as when insured, it may always do so by language, the object and meaning of which will be understood by both parties; and the courts should not thus construe words which are fully satisfied as a description of a present use or condition into a promissory warranty unless the inference is natural and irresistible that such was the understanding and design of both parties."⁶⁸

In the case cited, it was held that where a policy described the property insured as being "a two-story framed building, used for winding and coloring yarn, and for the storage of spun yarn," there was no warranty that such building should continue to be so used.

So it was held in a leading case decided by the Supreme Court of the United States that a warranty, in a contract of fire insurance, that "smoking is not allowed on the premises," was not broken by the fact that the assured or others afterwards smoked there, provided it was forbidden at the time the contract was entered into.⁶⁹ In a Virginia case,⁷⁰ in answer to the question, "Who sleeps in the store?" the plaintiff had written, "Watchman on premises at night." This statement, made a warranty by the policy, was held to refer only to the time of making the contract, and not to be a warranty that a watchman would be kept continuously on the premises thereafter.

⁶⁷ *O'NIEL v. INSURANCE CO.*, 3 N. Y. 122; *Smith v. Insurance Co.*, 32 N. Y. 399; *Gilliat v. Insurance Co.*, 8 R. I. 282, 91 Am. Dec. 229; *HOSFORD v. INSURANCE CO.*, 127 U. S. 399, 8 Sup. Ct. 1199, 32 L. Ed. 196. So the words, "Clerk sleeps in the store," in an application, have been construed as merely a description of occupancy, and not a promissory warranty. *Frisbie v. Insurance Co.*, 27 Pa. 325. But see *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 19, 54 Am. Dec. 309, where the statement, "There is a watchman nights," was held to constitute a warranty for the future, as well as the present.

⁶⁸ 32 N. Y. 399.

⁶⁹ *HOSFORD v. INSURANCE CO.*, 127 U. S. 399, 8 Sup. Ct. 1199, 32 L. Ed. 196.

⁷⁰ *Virginia Fire & Marine Ins. Co. v. Buck*, 88 Va. 517, 13 S. E. 973. See, also, *United States Fire & Marine Ins. Co. v. Kimberly*, 34 Md. 224, 6 Am. Rep. 325; *Frisbie v. Insurance Co.*, 27 Pa. 325.

WARRANTIES DISTINGUISHED FROM REPRESENTATIONS.

106. Warranties are distinguished from representations in that:
- (a) Warranties are parts of the contract, agreed to be essential; representations are but collateral inducements to it.
 - (b) Warranties are always written on the face of the policy, actually or by reference. Representations may be written in the policy or in a totally disconnected paper, or may be oral.
 - (c) Warranties are conclusively presumed to be material. The burden is on the insurer to prove representations material.
 - (d) Warranties must be strictly complied with, while substantial truth only is required of representations.
107. STATUTORY PROVISIONS—In many states statutes have been enacted, which, in effect, abolish all distinction between representations and warranties. It is generally provided by such statutes that in no case will a policy be avoided by a false representation or promise, unless such representation or promise be also material, or made with a fraudulent intent.

As previously shown, a representation or promise will only be given the effect of a warranty when it forms a part of the contract of insurance. In order to become a part of the contract, it must be contained in the policy itself, or expressly incorporated therein by reference.

A representation, on the other hand, while constituting an inducement to the contract, is collateral to it, and not only need not be made a part of the contract, either actually or by reference, but may be contained in some paper totally disconnected with the policy, or may even be oral.⁷¹ Manifestly, therefore, no difficulty can arise in construing as representations statements or promises which form no part of the contract.

A more difficult question presents itself, however, when the policy expressly states that the insured warrants the truth of certain representations or promises, under penalty of forfeiting all rights in the policy. When such representations or promises are contained in the policy, and there are no other provisions in it which would seem to throw doubt upon the real intention of the parties, they must be construed as warranties.⁷² But merely calling statements warranties does not make them so. If other provisions in the policy would seem to in-

⁷¹ *CLARK v. INSURANCE CO.*, 8 How. (U. S.) 235, 12 L. Ed. 1061; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567; *SNYDER v. LOAN CO.*, 13 Wend. (N. Y.) 92.

⁷² *Ripley v. Insurance Co.*, 30 N. Y. 136, 86 Am. Dec. 362; *Cobb v. Association*, 153 Mass. 176, 26 N. E. 230, 10 L. R. A. 666, 25 Am. St. Rep. 619; *JEFFRIES v. INSURANCE CO.*, 22 Wall. (U. S.) 47, 22 L. Ed. 833; *ÆTNA LIFE INS. CO. v. FRANCE*, 91 U. S. 510, 23 L. Ed. 401, and cases cited *supra*, note 55.

dicating that the parties only intended that the stipulations in question should be given the effect of representations, the courts are ever ready to construe them as such.⁷³ So, in all other doubtful cases, a statement will be construed as a representation rather than a warranty,⁷⁴ and thus, whenever possible, a forfeiture will be prevented, where it is sought to avoid a policy because of a false statement as to an immaterial matter.⁷⁵

When a statement or promise is contained in an instrument other than the policy, the presumption is that such a statement or promise

⁷³ *Wheaton v. Insurance Co.*, 76 Cal. 415, 18 Pac. 758, 9 Am. St. Rep. 216; *Fitch v. Insurance Co.*, 59 N. Y. 557, 17 Am. Rep. 372; *VIVAR v. KNIGHTS OF PYTHIAS*, 52 N. J. Law, 455, 20 Atl. 36; *Continental Life Ins. Co. v. Rogers*, 119 Ill. 474, 10 N. E. 242, 59 Am. Rep. 810.

⁷⁴ *PHOENIX MUT. LIFE INS. CO. v. RADDIN*, 120 U. S. 183, 7 Sup. Ct. 500, 30 L. Ed. 644.

For this reason, gratuitous answers written in the application—that is, answers not responsive to any questions asked—are held not to be warranties, even though the policy makes the statements of the application warranties. Thus, when the insured had added to his correct answer to a question as to other insurance, the uncalled-for statement, "Will drop Star July 15, '96," it was held that his failure to perform the promise so made was not a breach of warranty, and did not affect the validity of the contract. *Commercial Mut. Acc. Co. v. Bates*, 176 Ill. 194, 52 N. E. 49.

⁷⁵ *FIRST NAT. BANK v. HARTFORD FIRE INS. CO.*, 95 U. S. 673, 24 L. Ed. 563; *MOULOR v. INSURANCE CO.*, 111 U. S. 335, 4 Sup. Ct. 466, 28 L. Ed. 477. In a leading Alabama case the following are mentioned as among the settled rules for the construction of policies of insurance: (1) All the conditions and obligations of the contract will be construed liberally in favor of the insured, and strictly against the insurer. (2) The clearest and most unequivocal language is necessary to create a warranty, and all statements of doubtful meaning will be construed as representations, merely. (3) Even though a warranty in name or form be declared by the terms of the contract, its effect may be modified by other parts of the policy or of the application, including the questions and answers, so that answers to questions not material to the risk will be construed as warranting only their honesty and good faith. *Alabama Gold Life Ins. Co. v. Johnston*, 80 Ala. 467, 2 South. 125, 59 Am. Rep. 816; *Daniels v. Insurance Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192; *PHOENIX MUT. LIFE INS. CO. v. RADDIN*, 120 U. S. 183, 7 Sup. Ct. 500, 30 L. Ed. 644; *Providence Life Assur. Soc. v. Rentlinger*, 58 Ark. 528, 25 S. W. 835.

A warranty is never created by construction. A statement, to be given the effect of a warranty, must have been expressly declared as such, or must necessarily result from the terms of the contract. *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567.

Even though expressly declared a "warranty," however, a representation will not in all cases be construed as such. *Fitch v. Insurance Co.*, 59 N. Y. 557, 17 Am. Rep. 372; *Provident Sav. Life Assur. Soc. v. Cannon*, 103 Ill. App. 534; *Id.*, 201 Ill. 260, 66 N. E. 388. See, also, *Missouri, K. & T. Trust Co. v. German Nat. Bank*, 77 Fed. 119, 23 C. C. A. 65; *Rogers v. Insurance Co.*, 121 Ind. 577, 23 N. E. 498; *Garretson v. Association*, 93 Iowa, 409, 61 N. W. 954.

was intended as a representation; and, in order to give it the effect of a warranty, it must be clearly shown that such was the intention of the parties.⁷⁶ As said by the court in a leading Massachusetts case, in which it was sought to give to statements contained in the application the effect of warranties: "The application is, in itself, collateral merely to the contract of insurance. The statements, whether of facts or agreements, belong to the class of representations. They are to be so construed unless converted into warranties by force of a reference in the policy, and a clear purpose, manifest in the papers thus connected, that the whole shall form one entire contract."⁷⁷

Warranty—Conclusively Presumed Material.

When it is once determined that a certain representation or promise contained in the contract was intended as a warranty, it is conclusively presumed that it is material to the risk assumed by the insurer, and the insured can only recover on the policy in case the representation was exactly true, or the promise has been literally fulfilled.⁷⁸

A representation, on the other hand, will only avoid the policy if both false and material. The insurer must show the materiality of the representation in order to defeat an action on the policy.⁷⁹ A substantial compliance with a representation, even when material, is sufficient to prevent a forfeiture of the policy,⁸⁰ while a warranty must be strictly true.⁸¹ This rule is strikingly illustrated in the decisions of

⁷⁶ *Price v. Insurance Co.*, 17 Minn. 497 (Gil. 473), 10 Am. Rep. 166; *VIVAR v. KNIGHTS OF PYTHIAS*, 52 N. J. Law, 455, 20 Atl. 36; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567.

⁷⁷ *CAMPBELL v. INSURANCE CO.*, 98 Mass. 381, cited and approved in *Price v. Insurance Co.*, 17 Minn. 497 (Gil. 473), 10 Am. Rep. 166.

⁷⁸ See cases cited *supra*, note 55.

The doctrine is well stated in an early New York case: "A warranty by the assured in relation to the existence of a particular fact must be strictly true, or the policy will not take effect; and this is so whether the thing warranted be material to the risk or not. It would perhaps be more proper to say that the parties have agreed on the materiality of the thing warranted, and that the agreement precludes all inquiry on the subject." *BURRITT v. INSURANCE CO.*, 5 Hill, 193, 40 Am. Dec. 345.

⁷⁹ *Daniels v. Insurance Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567; *Fidelity & Casualty Co. v. Alpert*, 67 Fed. 460, 14 C. C. A. 474; *Mulville v. Adams* (C. C.) 19 Fed. 887; *PHOENIX MUT. LIFE INS. CO. v. RADDIN*, 120 U. S. 183, 7 Sup. Ct. 500, 30 L. Ed. 644.

⁸⁰ *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, 59 Am. Dec. 684; *Daniels v. Insurance Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192; *Higgle v. American Lloyds* (D. C.) 14 Fed. 148; *Missouri, K. & T. Trust Co. v. German Nat. Bank*, 77 Fed. 117, 23 C. C. A. 65.

⁸¹ A curious departure from this rule is found in *Continental Ins. Co. v. Kasey*, 25 Grat. (Va.) 268, 18 Am. Rep. 681, in which it is held that the breach of an immaterial warranty, not in fact relied on, does not avoid the contract. There the insured had warranted the building insured to be frame, whereas

cases involving statements by the insured as to the condition of his health. As shown above, the applicant's statement that he is not afflicted with a specified disease, or that he is in good health, if but a representation, is held to be merely a statement of opinion, the incorrectness of which does not invalidate the contract unless the opinion was fraudulently given. But if such a statement is warranted to be true in every respect, by the weight of authority,⁸² its incorrectness in fact will wholly avoid the policy, even though the insured acted in perfect good faith, and had no means of knowing that he was diseased. A few courts take the different view that the insured warrants only his good faith in making the representation as to his health,⁸³ and the latter holding is based on the sounder reasoning. The doctrine of warranties finds its sole justification in the right of the insurer to stipulate beforehand that all representations made shall be material, in order to escape the hazard of a verdict. But beyond the recognition of this right the law should not go. Warranties should be considered merely as representations conclusively material, and the same rule as to truthfulness applied to both. It seems scarcely necessary to hold that by an agreement of warranty the party insured intended to assume the hazard of stating as an ascertained fact a matter which, in its nature, often can be only a subject of opinion.

Effect of Statutory Enactments.

There can be no doubt but that the highly technical doctrine of warranty often works not only hardship, but also substantial injustice, upon

it was in fact built partly of logs. The agent of the insurer inspected the building and concurred with the insured in the description as made. Both insured and agent acted in good faith. It was held that under the circumstances the breach of warranty did not discharge the insurer. On the facts of the case, the decision was correct, as the representation was not really untrue, but the theory of the opinion is scarcely sound.

⁸² *Provident Savings Life Assur. Soc. v. Llewellyn*, 58 Fed. 940, 7 C. C. A. 579, 16 U. S. App. 405; *Day v. Insurance Co.*, 1 MacArthur (U. S.) 41, 29 Am. Rep. 565; *CAMPBELL v. INSURANCE CO.*, 98 Mass. 381; *Mutual Ben. Life Ins. Co. v. Miller*, 39 Ind. 475; *Powers v. Association*, 50 Vt. 630; *Baumgart v. Modern Woodmen*, 85 Wis. 546, 55 N. W. 713; *Metropolitan Life Ins. Co. v. Howle* (Ohio) 68 N. E. 4; *Richards v. Association*, 85 Me. 99, 20 Atl. 1050; *McClain v. Society* (C. C.) 105 Fed. 834; *Swick v. Insurance Co.*, 2 Dill. 160, Fed. Cas. No. 13,692; *Continental Life Ins. Co. v. Yung*, 113 Ind. 159, 15 N. E. 220, 3 Am. St. Rep. 630; *Woehle v. Insurance Co.*, 21 Misc. Rep. 88, 46 N. Y. Supp. 862; *Metropolitan Life Ins. Co. v. Dempsey*, 72 Md. 288, 19 Atl. 642. But see *MOULOR v. INSURANCE CO.*, 111 U. S. 335, 4 Sup. Ct. 466, 28 L. Ed. 447; *Northwestern Mut. Life Ins. Co. v. Woods*, 54 Kan. 663, 39 Pac. 189; *Tucker v. Association*, 133 N. Y. 548, 30 N. E. 723.

⁸³ *Grattan v. Insurance Co.*, 92 N. Y. 274, 44 Am. Rep. 372; *Ames v. Insurance Co.*, 40 App. Div. 465, 58 N. Y. Supp. 244; *Schwarzbach v. Protective Union*, 25 W. Va. 622, 52 Am. Rep. 227; *Knights of Honor v. Dickson*, 102 Tenn. 255, 52 S. W. 862; *Endowment Rank K. P. v. Cogbill*, 99 Tenn. 28, 41 S. W. 340.

parties insured.⁸⁴ Hence in many states acts have been passed for the purpose of either wholly abolishing the doctrine, or of moderating the harshness of its operation. The terms of these statutes vary greatly in the several states, but their general intent is to transform warranties into common-law representations, thus saving policies of insurance from forfeiture for false statements contained therein unless they are found to be material.⁸⁵ But as shown above, some of these statutes accomplish very different results; some apparently laying down a rule of decision less liberal to the insured than that of the common law, seemingly making a fraudulent immaterial misrepresentation fatal to the insured's rights,⁸⁶ while others make an honest misrepresentation harmless unless it is material to the risk itself, or concerns a fact that contributes to the loss or damage suffered.⁸⁷ In some states the statute does not apply to all warranties, but only to those made as answers to interrogations in the application.⁸⁸

⁸⁴ See *Metropolitan Life Ins. Co. v. Rutherford*, 98 Va. 195, 35 S. E. 361. In *Continental Fire Ins. Co. v. Whitaker* (Tenn. 1904) 79 S. W. 119, the court quotes as follows from the New Hampshire court: "The policy and purpose of the law were to promote honest and open fair dealing, to do equal justice, to protect the confidence reposed by the insured in those with whom he may contract, and (especially disclaiming any reference to this defendant company), to spring the traps 'concealed in the mass of rubbish' before the unwary traveler shall have put his foot in them, to prevent and prohibit, in short, the farce and fraud by which it has too often been found that the party apparently insured by the stipulations written upon one side of a piece of paper was uninsured by the conditions involved in the 'insurance typography' indorsed upon the other side of the same piece of paper."

⁸⁵ For examples of such statutes, see Code Ga. 1882, §§ 2803, 2804; *McClain's Code Iowa*, § 1743; *Laws Md.* 1894, c. 662; *Ky. St. c.* 32, § 639; *Rev. St. Me.* c. 49, § 20; *Laws Mich.* 1897, p. 214, No. 167; *Laws Minn.* 1895, c. 175, § 20; *Rev. St. Mo.* 1889, § 5849; *Laws N. H.* 1885, c. 73; *Rev. St. Ohio* 1890, § 3625; *Laws Pa.* 1885, p. 134, § 1; *Laws Va.* 1900, c. 515, p. 550.

⁸⁶ See *supra*, p. 284.

⁸⁷ These statutes have been held constitutional. *John Hancock Mut. Life Ins. Co. v. Warren*, 181 U. S. 73, 21 Sup. Ct. 535, 45 L. Ed. 955; *McGannon v. Insurance Co. (Mich.)* 87 N. W. 62, 54 L. R. A. 739. In this case the Michigan statute (Comp. Laws 1897, § 5180) was held broad enough to cover all policies, whether they be regarded as Michigan standard policies or not. This statute reads as follows: "That no policy of fire insurance shall hereafter be declared void by the insurer for the breach of any condition of the policy if the insurer has not been injured by such breach; or where a loss has not occurred during such breach or by reason of such breach of condition." The court, per Moore, J., said: "The defendant corporation is a creature of the statute. It could not engage in the business of insurance except by virtue of the statute. It is entirely competent for the Legislature to prescribe the forms of its contracts and the limitations in relation to forfeitures therein."

⁸⁸ See *Acts Va.* 1899-1900, p. 550. Also, see *Union Cent. Life Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421, 36 L. R. A. 271, 64 Am. St. Rep. 715, construing a similar Ohio statute (*Rev. St. Ohio* 1890, § 3625).

When the word "representation" is used in a statute in its ordinary sense, it includes both representations and warranties⁸⁰ in the technical sense; the same rule of materiality applying to both. And the question of materiality of any such statement is always for the jury,⁸¹ unless all the facts are ascertained, when it is for the court. Nor can the parties, by expressly agreeing upon the materiality of a statement made, withdraw the question from the jury.⁸² The provisions of the statute cannot be so waived.

As has been already shown, in connection with another subject, statutes, such as those under consideration, which provide that the insurer must comply with certain conditions before declaring a forfeiture, have no extraterritorial effect, unless it can be plainly seen that the parties intended the statute to form a part of the contract.⁸³ It would seem that a different conclusion has been reached by the Maryland court,⁸⁴ but the view taken by it is clearly in conflict with that of the United States Supreme Court as laid down in the case of *Mutual Life Ins. Co. v. Cohen*.⁸⁵

When the validity of these statutes has been brought into question, the courts have uniformly sustained them, as being cases of the valid

⁸⁰ *White v. Society*, 163 Mass. 108, 39 N. E. 771, 27 L. R. A. 398; *Germania Ins. Co. v. Rudwig*, 80 Ky. 223, overruling *Farmers' & Drovers' Ins. Co. v. Curry*, 13 Bush (Ky.) 312, 26 Am. Rep. 194; *PENN MUT. LIFE INS. CO. v. MECHANICS' SAV. BANK & TRUST CO.*, 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33; *March v. Insurance Co.*, 186 Pa. 629, 40 Atl. 1100, 65 Am. St. Rep. 887; *Hermany v. Association*, 151 Pa. 17, 24 Atl. 1064.

⁸¹ *PENN MUT. LIFE INS. CO. v. MECHANICS' SAV. BANK & TRUST CO.*, 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33; *Hermany v. Association*, 151 Pa. 17, 24 Atl. 1064.

But where the matter involved is manifestly material to the risk, the court will so pronounce it. *March v. Insurance Co.*, 186 Pa. 629, 40 Atl. 1100, 65 Am. St. Rep. 887; *Lutz v. Insurance Co.*, 186 Pa. 527, 40 Atl. 1104; *Fidelity Mut. Life Ass'n v. Miller*, 92 Fed. 63, 34 C. C. A. 211.

⁸² *Germania Ins. Co. v. Rudwig*, 80 Ky. 223; *Hermany v. Association*, 151 Pa. 17, 24 Atl. 1064.

⁸³ *Mutual Life Ins. Co. v. Cohen*, 179 U. S. 262, 21 Sup. Ct. 106, 45 L. Ed. 181. See *supra*, p. 226, where this question is discussed under the subject of statutory requirements for giving notice of premiums due.

See, also, *PENN MUT. LIFE INS. CO. v. MECHANICS' SAV. BANK & TRUST CO.*, 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33. In this case the Pennsylvania statute was made a part of the contract. The insured resided in New Jersey.

⁸⁴ The court bases its opinion upon the fact that a corporation has only such powers as are conferred upon it by the state in which it was created. "Everywhere within and without the state which created it, its contracts are limited, construed, and sustained according to its character and the laws which affect its operation." *Fidelity Mut. Life Ass'n v. Ficklin*, 74 Md. 172, 21 Atl. 680.

⁸⁵ 179 U. S. 262, 21 Sup. Ct. 106, 45 L. Ed. 181.

exercise of the police power of the state over corporations, and not in violation of the Constitution of the United States.⁸⁶

⁸⁶ *PENN MUT. LIFE INS. CO. v. MECHANICS' SAV. BANK & TRUST CO.*, 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33. As to the validity of similar statutes, see *Queen Ins. Co. v. Leslie*, 47 Ohio St. 409, 24 N. E. 1072, 9 L. R. A. 45; *Equitable Life Assur. Soc. v. Pettus*, 140 U. S. 226, 11 Sup. Ct. 822, 35 L. Ed. 497; *Eagle Ins. Co. v. State of Ohio*, 153 U. S. 446, 14 Sup. Ct. 868, 38 L. Ed. 778; *Hancock Mut. Life Ins. Co. v. Warren*, 181 U. S. 73, 21 Sup. Ct. 535, 45 L. Ed. 955; *Continental Fire Ins. Co. v. Whitaker* (Tenn. 1904) 79 S. W. 119.

CHAPTER IX.

INSURANCE AGENTS AND THEIR POWERS.

108. The Doctrine of Agency in Insurance Law.
 109-110. Classes of Agents and Their Powers.
 111-113. Subagents—Their Appointment and Powers.
 114-117. Limitations upon the Powers of Agents.

THE DOCTRINE OF AGENCY IN INSURANCE LAW.

108. The relation of principal and agent in the conduct of insurance business is created and terminated in accordance with the rules of the general law of agency, and characterized by the same incidents as the same relation existing under similar conditions in any other business. For the purpose of clearing the view of other questions, the following settled principles should be noted:
- (a) There is no presumption that one person has authority to bind another by word or act. Such authority must be proved to have been actually or apparently given.
 - (b) The insurer is estopped to deny that his agent possesses that authority with which he had apparently clothed him.
 - (c) Limitations upon the powers apparently possessed by an insurance agent cannot affect the insured unless communicated.
 - (d) Certain burdensome incidents accompany the conduct of business through an agent, which, having their basis in a sound public policy, cannot be escaped. Among these are:
 - (1) Any fraud or wrong perpetrated by the agent in the course of his employment binds the principal, though not authorized.
 - (2) Any knowledge possessed by the agent, material to the transaction in which he is employed, will bind the principal, irrespective of its actual communication by the agent.
 - (e) The person for whom the agent acts is to be determined by the facts of each case, and not by the mere words of the parties, but an agent cannot act for both parties without the consent of both.

Scope and Purpose of This Chapter.

The fact that the business of insurance is almost exclusively in the hands of corporations, which can act only through agents, makes the principles of the law of principal and agent of great importance in the law of insurance, while the complex relations existing between the varying orders of agents required for the conduct of such a widely extended business as is carried on by most insurance companies necessarily give rise to many difficult questions of law. It is these questions,

peculiar to insurance law, and especially those connected with the doctrine of waiver and estoppel, to be presently treated, that are to be examined in this chapter. It is not purposed here to set forth a treatise on the general law of agency, almost every phase of which might find illustration in the vast number of insurance cases. Therefore, for a statement of the modes in which an agency may be established or terminated, or of the incidents of the relation between principal and agent, such as their mutual rights and duties, or the liabilities of each to third parties in general, the reader should consult a work on agency.¹ Neither is it advisable to attempt to set forth here the great mass of insurance cases involving these general questions of agency. They may be found in the digests.²

The constant struggle made by the courts to preserve the equitable rights of parties insured, and, at the same time, the established rules of the law of contracts and of evidence, has given great importance to the equitable doctrines of waiver and estoppel. As will be presently seen, the cases have fallen into seemingly hopeless confusion. Many of the difficulties which have given rise to this confusion grow out of uncertainty as to the powers of agents under the facts of the particular cases presented to the courts for adjudication. It is therefore believed that in the effort to clear away the obstructions found in our case law in the way of any attempt to establish a series of consistent principles that either do govern or should govern the decision of questions of waiver and estoppel in insurance law, a statement of certain applied principles of the law of principal and agent is necessary. The statement and establishment of such principles is, then, the sole purpose of this chapter.

Regulation of Insurance Agencies by Statute.

It is first to be noted that the conduct of an insurance agency is so far a matter of public concern as to make it a proper subject of legislative control by the states without violating the provisions of the fourteenth amendment of the federal Constitution.³ Thus a state may forbid any person's acting as an agent for any insurance company without having first procured a license.⁴ So it may absolutely prohibit soliciting insurance, or otherwise acting as agent, for any foreign insur-

¹ In the Hornbook Series, see Tiffany on Agency. See, also, Joyce on Insurance, vol. 1, cc. 17-24.

² See title "Insurance," vol. 28, Century Digest, cols. 533-640 et passim.

³ Nutting v. Massachusetts, 183 U. S. 553, 22 Sup. Ct. 238, 46 L. Ed. 324, affirming Com. v. Nutting, 175 Mass. 154, 55 N. E. 895, 78 Am. St. Rep. 483.

For the construction of the anti-rebate statute of Illinois (Laws 1891, p. 148), see Metropolitan Life Ins. Co. v. People (Ill. 1904) 70 N. E. 643.

⁴ See Acts Va. 1887, p. 348. A similar statute was held constitutional in Nutting v. Massachusetts, 183 U. S. 553, 22 Sup. Ct. 238, 46 L. Ed. 324. See Pierce v. People, 106 Ill. 11, 46 Am. Rep. 683.

ance corporation not authorized to do business within the state, and a penalty may be imposed for the enforcement of such a prohibition.⁵

In many states, statutes have been enacted declaring that the person who solicits insurance shall in all cases be deemed the agent of the insurer. The language of the Iowa statute⁶ is as follows: "Any person who shall hereafter solicit insurance or procure applications therefor, shall be held to be the soliciting agent of the insurance company or association issuing a policy on such application, or on a renewal thereof, anything in the application or policy to the contrary notwithstanding."

The Supreme Court has decided⁷ that the provisions of this statute apply to all kinds of insurance, but in other states it is limited to special forms of insurance. In Virginia⁸ the act applies only to companies doing business upon the assessment plan. It has been held, however, that these statutes do not prevent a broker employed by the

⁵ *Nutting v. Massachusetts*, 183 U. S. 553, 22 Sup. Ct. 238, 46 L. Ed. 324; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552, affirming *Daggs v. Insurance Co.*, 136 Mo. 382, 38 S. W. 85, 35 L. R. A. 227, 58 Am. St. Rep. 638.

⁶ *Laws Iowa 1880*, p. 209, c. 211. See, also, *McClain's Code Iowa 1888*, § 1732. The Wisconsin statute (Rev. St. § 1977) is as follows: "Whoever solicits insurance on behalf of an insurance corporation, or transmits an application for insurance or a policy of insurance to or from any such corporation, or who makes any contract of insurance, or collects or receives any premiums for insurance, or in any manner aids or assists in doing either, or in transacting any business for any insurance corporation, or advertises to do any such thing, shall be held an agent of such corporation, to all intents and purposes, and the word 'agent,' whenever used in this chapter, shall be construed to include all such persons." For a construction of this statute, see *Mathers v. Association*, 78 Wis. 588, 47 N. W. 1130, 11 L. R. A. 83, in which it was held that the statute conferred upon a local agent the power to make an oral contract of insurance, despite a stipulation in the application, signed by the insured, that the insurer should not be liable until the application and premium had been received by the secretary of the company. This statute applies to a foreign insurance company. *Mutual Ben. Life Ins. Co. v. Robison (C. C.)* 54 Fed. 580. These statutes have been held constitutional. *Noble v. Mitchell*, 164 U. S. 367, 17 Sup. Ct. 110, 41 L. Ed. 427. See *Code Ala. 1886*, § 1205; *Gen. St. Conn. 1888*, §§ 2898, 2923; *Laws Ga. 1887*, p. 121, § 9; *Rev. St. Me. 1883*, p. 445, § 19; *St. Mass. 1887*, c. 214, § 87; *Laws Minn. 1895*, c. 175, §§ 25, 88, 91; *Ann. Code Miss. 1892*, § 2327; *Rev. St. Mo. 1889*, § 5915; *Laws N. D. 1891*, p. 203, § 28; *Comp. St. Neb. 1891*, c. 16, § 8; *Laws N. H. 1889*, c. 94, § 2; *Rev. St. Ohio, Smith & B. 1890*, § 3644; *St. Okl. 1890*, p. 637, § 23; *Pub. Laws R. I. 1884*, p. 55; *Pub. Laws R. I. 1885*, p. 63; *Acts S. C. 1883*, p. 460, § 6; *Rev. St. Tex. 1895*, art. 3093; *Rev. Laws Vt. 1880*, § 3620, p. 697; *Acts Va. 1887*, p. 349, c. 271, § 5.

⁷ *Continental Life Ins. Co. v. Chamberlain*, 132 U. S. 304, 10 Sup. Ct. 87, 33 L. Ed. 341.

⁸ *Acts Va. 1887*, c. 271, § 5. Under a similar statute in Wisconsin it was held that an incorporated mutual insurance company was within the statute. *Zell v. Insurance Co.*, 75 Wis. 521, 44 N. W. 828.

insured from binding the insured by agreements made in procuring the insurance.⁹

General Rule as to Agent's Powers.

The maxim that every one deals with an agent at his peril means merely that there is no presumption that any person is authorized to act for another. A man can be made liable to another only through his own words or acts, unless it can be clearly proved that he has deputized another to represent him in the transaction out of which it is alleged the liability grows. Therefore, in the absence of circumstances of estoppel, it is incumbent upon the one seeking to charge another with liability for the act of a third person to prove that such third person was actually authorized to incur that liability on behalf of that other, or that his unauthorized act in so doing was subsequently ratified. Such proof of actual authority need not, however, show authority expressly conferred. There may be powers not expressly given which are yet necessarily incidental to the proper and efficient exercise of those powers expressly conferred.¹⁰ Thus, if an agent is expressly authorized to deliver a policy which can be properly delivered only upon payment of the first premium, that agent has incidental authority to collect and receipt for the premium.¹¹ So an agent who is authorized to contract for insurance and to sign and issue policies has the incidental power in emergencies to make preliminary oral contracts.¹²

Likewise a custom or usage may confer powers not expressly given, but which are none the less actual. Thus the custom among fire insurance agents of giving credit for premiums authorizes such an agent to make a binding contract without requiring prepayment.¹³

Apparent Powers—Estoppel.

But despite the rule that every one deals with an agent at his peril, a principal may sometimes be bound by acts of another which were not authorized, or which were even prohibited. This is based upon the principle of estoppel. While, under the rule above stated, one must, before dealing with a person professing to act as an agent, satisfy himself that the agent has been clothed with the powers he proposes to exercise, yet in so doing he is not obliged to go beyond the requirements

⁹ *JOHN R. DAVIS LUMBER CO. v. HARTFORD FIRE INS. CO.*, 95 Wis. 226, 70 N. W. 84, 37 L. R. A. 131.

¹⁰ See, on this subject, *Tiffany, Agency*, pp. 174-179.

¹¹ *Sun Mut. Ins. Co. v. Saginaw Barrel Co.*, 114 Ill. 99, 29 N. E. 477; *Riley v. Insurance Co.*, 110 Pa. 144, 1 Atl. 523; *De Camp v. Insurance Co.*, Fed. Cas. No. 3,719.

¹² *Angell v. Insurance Co.*, 59 N. Y. 171, 17 Am. Rep. 322; *Eames v. Insurance Co.*, 94 U. S. 621, 24 L. Ed. 298.

¹³ *Long v. Insurance Co.*, 137 Pa. St. 335, 20 Atl. 1014, 21 Am. St. Rep. 879; *Lebanon Mut. Ins. Co. v. Hoover*, 113 Pa. St. 591, 8 Atl. 163, 57 Am. Rep. 511.

of good faith and reasonable diligence. If the conduct of the principal has been such as to give the third party reasonable grounds for believing, in good faith, that the agent did really possess the powers exercised, the principal will be estopped from saying that the appearances created by his own conduct were false, and that the agent acted without authority.¹⁴ Thus, if the insurer had repeatedly permitted his agent to extend the time for the payment of premiums, he would be estopped to say that a subsequent agreement made by the agent for such an extension of time was unauthorized and not binding on himself.¹⁵

Thus it is seen that an agent's "apparent scope of authority" includes: (a) Actual powers, which, in turn, are (1) those expressly given, (2) those incidental to the express powers, and (3) those conferred by custom and usage; and (b) apparent powers.

No Secret Limitations upon Apparent Powers.

The insurer may limit the powers of his agent as narrowly as he pleases, provided these limitations are made known to third parties dealing with the agent. But it is manifest from the statement of the rule as to the principal's liability for acts done within the apparent scope of his agent's authority, as made above, that any secret limitations upon the agent's apparent powers are wholly inoperative.¹⁶

Burdensome Incidents of Agency—Agent's Fraud—Imputed Knowledge.

Another important principle of especial value in determining the rights of parties to insurance contracts, and one that must be constantly kept in mind, is that the policy of the law attaches certain burdensome incidents to the conduct of business through an agent. These incidents are not directly contractual in their nature, but arise, rather, out of the existent relation of principal and agent; that is, they have

¹⁴ Declarations of the secretary of a fire insurance company to the assured that a written approval of a transfer of the policy was not necessary precludes the company from objecting to the want of written approval, though the policy required such approval. *Stolle v. Insurance Co.*, 10 W. Va. 546, 27 Am. Rep. 593.

Where an application for fire insurance contains a diagram of the insured's property, and the solicitor states, in response to printed questions, which it is provided he shall answer, that he has examined the risk, the company cannot deny that the solicitor was agent for the purpose of examining the property. *Springfield Fire & Marine Ins. Co. v. McNulty*, 8 Ky. Law Rep. 876.

See, also, *McCraw v. Insurance Co.*, 78 N. C. 149; *Anthony v. Insurance Co.*, 48 Mo. App. 65; *Jennings v. Insurance Co.*, 148 Mass. 61, 18 N. E. 601.

¹⁵ *Knickerbocker Life Ins. Co. v. Norton*, 96 U. S. 234, 24 L. Ed. 689.

¹⁶ See *Tiff. Ag. p. 195*; *Georgia Home Ins. Co. v. Kinnler's Adm'x*, 28 Grat. 88, 109; *Michigan Fire & Marine Ins. Co. v. Wich*, 8 Colo. App. 416, 46 Pac. 687, 689; *UNION MUT. LIFE INS. CO. v. WILKINSON*, 13 Wall. (U. S.) 222, 20 L. Ed. 617.

their origin in status, rather than in contract,¹⁷ and may be more clearly understood by reference to the civil-law fiction of identity between principal and agent.¹⁸ They are analogous to those incidents attached by the law to the relation of husband and wife, such as the husband's duty of support, or to the relation of master and servant, such as the master's obligation to afford the servant a safe place in which to work, safe tools to work with, and competent fellow servants to aid him, if need be, or to the relation of carrier and passenger, such as the carrier's duty to carry safely and protect from injury his passenger.

Two of these incidents of agency are of especial importance in insurance law:

(1) The principal is liable for any fraud or other wrong perpetrated by his agent in the course of his employment. Even though such wrong had its origin solely in the wickedness or carelessness of the agent, a wholly innocent principal will be held liable for it, provided it was done in the course of the transaction in which the agent was authorized to represent the principal. Thus the principal is liable for slander or libel uttered by the agent in the course of his employment,¹⁹ not because such wrong was authorized, but because the principal is deemed to be acting in the person of his agent, and, in accordance with a sound public policy, must be responsible for the wrong acting of the agent in the premises. In that transaction the agent stands in the place of the principal—according to the fiction, is identified with him. So, on the same principle, a corporation is liable in deceit for the false issue of certificates by its agent,²⁰ and a railway company for false im-

¹⁷ *Tiff. Ag. p. 10*.

¹⁸ See *Sohm's Institutes of Roman Law*, § 32.

¹⁹ *Washington Gaslight Co. v. Lansden*, 172 U. S. 534, 19 Sup. Ct. 296, 43 L. Ed. 543; *Sun Life Assur. Co. v. Bailey*, 101 Va. 443, 44 S. E. 692, 9 Va. Law Reg. 187. It should here be noticed that there is a difference in the grounds upon which a principal is held liable for the unauthorized acts of his agent within the apparent scope of his authority, and for those not within the apparent scope of his authority, but within the course of his employment. In the first case the basis of the principal's liability is clearly found in the doctrine of estoppel. The principal is liable, not because he has authorized the agent thus to act, but because he has allowed the agent to mislead the party to his injury. But the principle upon which a principal is held liable for the unauthorized acts of his agent within the course of his employment, but without the apparent scope of his authority, is entirely different. Here the principal's liability is based upon the fiction of identity. The basis of the injured party's right to compensation from the principal in these cases is the duty which rests upon every man to conduct his business, whether in person or by agents, so as to injure no one. *Sic utere tuo ut alienum non lædas*.

²⁰ *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30. Upon this question there is a direct conflict of authority. In England it is held that the principal is liable only when the wrong was for his (the principal's) benefit. See *British Mut. Banking Co. v. Charnwood Forest R. Co.*, 18 Q. B. Div. 714;

prisonment by its conductor.²¹ So, if an insurance agent fraudulently induces the insured to make a contract that otherwise he would not have made, the insurer becomes responsible for the fraud, and may be estopped to claim any advantage growing out of that fraud, even though perpetrated without authority or expressly forbidden.²²

Nor would any other rule be just or reasonable, despite the fact that dishonest or careless agents thus often inflict great hardships upon innocent principals, for otherwise the person who carried on his business through representatives would occupy a far more favorable position than if acting in his own proper person, while the third party dealing with such representatives would be put at a gross disadvantage.

Again, (2) a second incident of the relation of principal and agent is that any information material to the transaction either possessed by the agent at the time of the transaction, or acquired by him before its completion, is deemed to be the knowledge of the principal, at least as far as that transaction is concerned, even though in fact the knowledge is not communicated to the principal at all.²³

It is here to be observed—and the importance of the principle is so great that it cannot be too strongly emphasized—that these incidents of agency are created by the law, and not by the parties. The insurer is charged with the knowledge acquired by his agent in making or negotiating a contract of insurance, not because he has consented to be so

Barwick v. Bank, L. R. 2 Exch. 259. While there is no decision of the United States Supreme Court directly in point, it is clear that the tendency of that court is to follow the English view. See *Moore v. Bank*, 111 U. S. 156, 4 Sup. Ct. 345, 28 L. Ed. 385; *Friedlander v. Railway Co.*, 9 Sup. Ct. 570, 130 U. S. 416, 32 L. Ed. 991. But the weight of authority and the clear weight of reasoning seem to be as stated in the text. The leading case (*New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30) has been followed by the later decisions. See *Fifth Ave. Bank v. Forty-Second St. & G. St. Ferry R. Co.*, 137 N. Y. 231, 33 N. E. 378, 19 L. R. A. 331, 33 Am. St. Rep. 712; *Allen v. Railroad Co.*, 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. Rep. 185. For a full and clear discussion of this subject, see *Tiff. Ag.* pp. 290-294.

²¹ *Palmer v. Railway Co.*, 133 N. Y. 261, 30 N. E. 1001, 16 L. R. A. 136, 28 Am. St. Rep. 632; *Kruelevitz v. Railroad Co.*, 143 Mass. 228, 9 N. E. 613.

²² *KAUSAL v. ASSOCIATION*, 31 Minn. 17, 16 N. W. 430, *Woodruff, Ins. Cas.* 517, 47 Am. Rep. 776; *Aetna Live Stock Fire & Tornado Ins. Co. v. Olmstead*, 21 Mich. 246, 4 Am. Rep. 483.

²³ *Forward v. Insurance Co.*, 142 N. Y. 382, 37 N. E. 615, 25 L. R. A. 637; *Mesterman v. Insurance Co.*, 5 Wash. 524, 32 Pac. 458, 34 Am. St. Rep. 877. In *Story on Agency*, § 140, it is said: "Notice of facts to an agent is constructive notice thereof to the principal himself, when it arises from or is connected with the subject-matter of his agency, for, upon general principles of public policy, it is presumed that the agent has communicated such facts to his principal, and, if he has not, still, the principal having intrusted the agent with the particular business, the other party has the right to deem his acts and knowledge obligatory upon the principal; otherwise the neglect of the agent, whether designed or undesigned, might operate most injuriously to the rights and interests of such party."

charged, nor because he has authorized his agent so to bind him, but because, as a legal consequence of the relation he sustains to the agent, the latter's knowledge is imputed to him. It therefore follows that this incident created by the law in response to the demands of public policy, irrespective of agreement, cannot be destroyed or altered by the agreement of the parties. The parties cannot by their contract contravene the policy of the law in this instance any more than the husband, by contract, can escape his duty to support the wife, or the carrier can by contract exempt himself from liability for his negligent failure to carry safely his passenger. Those cases which ignore this principle, and regard these legal incidents as powers conferred and subject to limitation, are much to be deplored.²⁴ Insurers should undoubtedly be allowed to protect themselves, in any legal way possible, against the fraud of their unfaithful agents, but not at the expense of innocent third parties. And when a loss caused by a dishonest agent must fall upon his principal or a third party, both equally innocent, the courts should not, and do not, ordinarily, hesitate in putting the burden upon the person who selected and controlled the agent.²⁵

For Whom the Agent Acted.

Controversy has not infrequently arisen as to who was represented by an agent taking part in the negotiation of the insurance contract, and it is often sought to avoid such controversy by an agreement set forth in the policy or application. But it is clear that this is a question of fact, not of stipulation. Hence it is to be determined from all the facts of each case, and not from the mere words used, whether the agent represented the insurer or insured, or whether he acted for both, as a broker ordinarily does.²⁶ But it is, of course, fraudulent for the same agent to act for both parties without the knowledge and consent of both.²⁷

²⁴ As examples of such cases, see *RYAN v. INSURANCE CO.*, 41 Conn. 168, 19 Am. Rep. 490; *NEW YORK LIFE INS. CO. v. FLETCHER*, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934.

²⁵ See *Continental Fire Ins. Co. v. Whitaker* (Tenn. 1904) 79 S. W. 119; *Mutual Fire Ins. Co. v. Ward*, 95 Va. 231, 28 S. E. 209; *Sternaman v. Insurance Co.*, 170 N. Y. 13, 62 N. E. 763, 57 L. R. A. 318, 88 Am. St. Rep. 625.

²⁶ See *Smith & Wallace Co. v. Prussian Nat. Ins. Co.* (N. J.) 54 Atl. 458. But the insured may make the agent of the insurer his own agent in behalf of some particular transaction. Thus it has been held that an agent representing a number of insurance companies may be authorized by an owner desiring to keep his property insured to accept for him notice of a cancellation of an existing policy, and thereupon to write the risk in another company. *Johnson v. Insurance Co.*, 66 Ohio St. 6, 63 N. E. 610.

²⁷ See *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 85; *Greenwood Ice & Coal Co. v. Georgia Home Insurance Co.*, 72 Miss. 46, 17 South. 83; *Fitzsimmons v. Express Co.*, 40 Ga. 330, 2 Am. Rep. 577; *Smith & Wallace Co. v. Prussian Nat. Ins. Co.*, *supra*.

CLASSES OF AGENTS AND THEIR POWERS.

109. The powers of an agent in any particular transaction are always to be determined by the facts of that case, irrespective of his title or class, yet, for convenience of reference, insurance agents are classified as
- (a) General agents, who possess general powers of making insurance contracts on behalf of the principal.
 - (b) Special or local agents, sometimes known as "solicitors," whose powers are ordinarily confined to soliciting applications for insurance and delivering policies issued thereon, and receiving initial premiums. Their powers are rather ministerial than contractual.
 - (c) Brokers, who usually act for the insured, but may act for the insurer, or for both insured and insurer, according to the facts in each case.
110. In addition to these more familiar classes of agents are to be noted the board of directors of the corporation, who possess practically all the powers of the corporation, and the executive officers, who, through the directors, are authorized to exercise all the active powers of the corporation.

The habit of basing rules of law upon titles given to or borne by agents, which, like many other American titles, are of uncertain significance, has produced so much confusion as to the ultimate principles underlying those rules that it is perhaps to be regretted that such "fluid" terms as "general agent" and "special agent" were ever introduced into the law of principal and agent. In the nature of things, it is impossible that the powers of any agent can be fixed by his title. The possession of authority, whether actual or apparent, is a question of fact, not of words. As shown above, the question whether any given act of an agent binds his principal is to be decided by determining whether the third party had reasonable grounds for believing, under all the facts of the case, that the principal had authorized that act. If such reasonable ground does exist, the principal is bound, whether the agent has been entitled "general agent," "solicitor," or "president." It is easily possible that in reference to some particular transaction a special agent may be vested with all the powers of the insurer, and it is not impossible that a figurehead president should be stripped of all powers. The giving to an agent of a title having a customary significance may, however, constitute one of the facts from which the third party may infer the possession of some particular power. Thus an agent given by the insurer the title of general agent will ordinarily be supposed to possess all those powers customarily exercised by insurance agents so entitled, while denominating an agent a special or soliciting agent is a fact indicating the possession of only limited powers.

But however unsatisfactory this classification of agents may be as founding rules of law, it is yet of so much convenience in general reference to agents possessing broad or narrow powers that it is deemed advisable to set it forth. In making this classification, however, the agents of corporate insurers only will be considered. It is first to be noted that a corporation must necessarily exercise all of its active powers through agents. The stockholders who form the corporation can perform certain corporate acts, such as ordering the issue of stock, making by-laws, and electing officers, but the business of the corporation must necessarily be transacted by representatives. These representatives are of many different ranks of authority, and necessarily differ largely in the powers possessed. To the board of directors are delegated primarily nearly all the powers of the corporation, and the directors in turn delegate all of the active powers of the corporation to certain executive officers selected by them. The executive officers then appoint other agents to represent the company in certain districts of the territory to be occupied, while these secure yet other and more numerous representatives for the company within the smaller localities of their respective districts. In addition to these more usual and numerous representatives, the insurer appoints other agents for the performance of special functions, such as adjusters, appraisers, and attorneys. The powers usually possessed by these several classes of agents will now be considered.

General Agents and Their Powers.

The term "general agent" vaguely indicates an agent who is authorized to transact all of his principal's business of a particular kind or in a particular place.²⁸ The place may be narrowly circumscribed, yet, if the agent within that locality is authorized to do all the acts in the conduct of the business intrusted to his charge that his principal could do if present in his proper person, he is denominated a general agent. In the insurance business the term is largely geographic in its significance, as is indicated by the synonymous expressions, "district" and "division" agents; that is, an agent who stands as the representative of his principal within a certain district or division of territory is a general agent, and may reasonably be supposed to possess broad powers. But even though an agent has no especial district under his supervision, he will yet be called a general agent if he has full powers of contracting for insurance on behalf of his principal. So if an agent is authorized to pass upon and accept risks, to agree upon the terms of insurance, and to execute and deliver policies in accordance therewith, he will be considered a general agent.²⁹ It follows from a recital of these powers

²⁸ Tiff. Ag. p. 190.

²⁹ Travelers' Ins. Co. v. Harvey, 82 Va. 949, 5 S. E. 553; Pitney v. Insurance Co., 65 N. Y. 6.

that such a general agent has always apparent authority to take from or add to the printed form of policy such terms as may be agreed upon,³⁰ or, discarding the printed form altogether, he may bind his principal by a parol agreement.³¹ And, as he can strike from the printed policy any term, so he may expressly or impliedly waive the operation of any term, even though that term may be one denying the power of any agent to waive any term of the contract, save in a specified manner.³² So he may waive a condition requiring prepayment of the premium upon delivery of the policy,³³ or he may waive proofs of loss after the destruction of property insured.³⁴ He can usually appoint subagents, appraisers, and adjusters, and may himself settle losses in such a way as to bind the insurer. He may receive notice³⁵ on behalf of his company, and do all other acts connected with the business in-

³⁰ *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345, 15 Am. Rep. 612; *Taylor v. Insurance Co.*, 98 Iowa, 521, 67 N. W. 577, 60 Am. St. Rep. 210. An agent's authority to change a policy may be inferred from custom. *Day v. Insurance Co.*, 88 Mo. 325, 57 Am. Rep. 416.

³¹ *Stehlick v. Insurance Co.*, 87 Wis. 322, 58 N. W. 379; *Stickley v. Insurance Co.*, 37 S. C. 56, 16 S. E. 280; *Baker v. Insurance Co.*, 162 Mass. 358, 38 N. E. 1124; *Bauble v. Insurance Co.*, Fed. Cas. No. 1,111; *Harron v. Insurance Co.*, 88 Cal. 16, 25 Pac. 982; *Woody v. Insurance Co.*, 31 Grat. (Va.) 362, 31 Am. Rep. 732; *Eames v. Insurance Co.*, 94 U. S. 621, 24 L. Ed. 298; *Farnum v. Insurance Co.*, 83 Cal. 246, 23 Pac. 869, 17 Am. St. Rep. 233.

³² *Phenix Ins. Co. v. Hart*, 149 Ill. 513, 36 N. E. 990; *Mix v. Insurance Co.*, 169 Pa. 639, 32 Atl. 460; *Young v. Insurance Co.*, 45 Iowa, 377, 24 Am. Rep. 784; *Renier v. Insurance Co.*, 74 Wis. 89, 42 N. W. 208; *Berry v. Insurance Co.*, 132 N. Y. 49, 30 N. E. 254, 28 Am. St. Rep. 548; *Wyman v. Insurance Co.*, 119 N. Y. 274, 23 N. E. 907; *Redstrake v. Insurance Co.*, 44 N. J. Law, 294.

³³ *Stewart v. Insurance Co.*, 155 N. Y. 257, 49 N. E. 876, 42 L. R. A. 147; *Cole v. Insurance Co.*, 22 Wash. 26, 60 Pac. 68, 47 L. R. A. 201; *Southern Life Ins. Co. v. Booker*, 9 Heisk. (Tenn.) 606, 24 Am. Rep. 344; *Universal Fire Ins. Co. v. Block*, 109 Pa. 535, 1 Atl. 523.

³⁴ *Little v. Insurance Co.*, 123 Mass. 380, 25 Am. Rep. 96. Proofs of loss are waived by the agent's promise to pay. *Ames v. Insurance Co.*, 14 N. Y. 253; *Perry v. Insurance Co. (C. C.)* 11 Fed. 478; *Prentice v. Insurance Co.*, 77 N. Y. 483, 33 Am. Rep. 651; *Phoenix Ins. Co. v. Bowdre*, 67 Miss. 620, 7 South. 596, 19 Am. St. Rep. 326; *Indian River State Bank v. Hartford Fire Ins. Co. (Fla.)* 35 South. 228.

³⁵ *Burlington Ins. Co. v. Lowery*, 61 Ark. 108, 32 S. W. 383, 54 Am. St. Rep. 196; *Pennypacker v. Insurance Co.*, 80 Iowa, 56, 45 N. W. 408, 8 L. R. A. 236, 20 Am. St. Rep. 395; *West Branch Ins. Co. v. Helpenstein*, 40 Pa. 289, 80 Am. Dec. 573. The company is chargeable with the knowledge of its agent as to incumbrances on property insured. *Beebe v. Insurance Co.*, 93 Mich. 514, 53 N. W. 818, 18 L. R. A. 481, 32 Am. St. Rep. 519; *Tarbell v. Insurance Co.*, 63 Vt. 53, 22 Atl. 533; *Frane v. Insurance Co.*, 87 Iowa, 288, 54 N. W. 237.

Notice to the general agent that the insured is using an engine on the premises is notice to the company. *Schaeffer v. Insurance Co.*, 80 Md. 563, 31 Atl. 317, 45 Am. St. Rep. 361.

trusted to him as fully as the company itself could do them.³⁶ He may also institute legal proceedings on behalf of his principal to recover sums due it.³⁷ But it must be borne in mind that these powers thus enumerated are but customary, and that any of them may be cut off by a known limitation.³⁸

Special Agents.

The powers of the special agent are partially defined by the other terms used in designating him, such as "soliciting" agent and "local" agent; the latter term being in contradistinction to the title "district agent," sometimes given to the general agent, as stated above. In its most general sense, the term "special agent" includes any representative of the insurer vested with authority to do some special act or acts, or charged with the performance of some special duty. In this sense of the words, solicitors, attorneys, medical examiners, adjusters, and appraisers are all special agents. But the term is ordinarily, in insurance law and literature, given a much narrower meaning, and includes only those agents possessed of limited contractual powers, that are to be exercised only within a limited territory, and who, as a class, are recognized by the public as having small authority. The customary functions of such agents are to induce third parties to make application for insurance, to forward such applications as are made to the insurer, and to deliver the policies issued upon the receipt of the first premium in cash.³⁹ He may have, and frequently has, other powers given him, such as making a binding preliminary contract pending the acceptance

³⁶ *Union Mut. Life Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222, 20 L. Ed. 617; *Tubbs v. Insurance Co.*, 84 Mich. 652, 48 N. W. 298. The insurer is bound by an assignment approved by its general agent. *Breckinridge v. Insurance Co.*, 87 Mo. 71.

The authority of a general agent to act for his company in any given case depends on the powers apparently given him by his principal, which the insured may infer from the circumstances. *Sheppard v. Insurance Co.*, 21 W. Va. 331. An insurance company cannot plead any limitations on its agent's apparent authority unless the insured had knowledge of the restriction. *Michigan Fire & Marine Ins. Co. v. Wich*, 8 Colo. App. 416, 46 Pac. 689; *Georgia Home Ins. Co. v. Kinnier's Adm'x*, 28 Grat. (Va.) 88, 109; *Fireman's Fund Ins. Co. v. Norwood*, 69 Fed. 71, 16 C. C. A. 136.

³⁷ But it is doubtful whether a general agent who is not expressly authorized can institute criminal proceedings on behalf of his principal. *Larson v. Association*, 71 Minn. 101, 73 N. W. 711. But it was held in *Turner v. Insurance Co.*, 55 Mich. 236, 21 N. W. 326, that a general agent of an insurance company has such authority as will make his principal liable for a malicious prosecution instituted in his principal's behalf.

³⁸ See *Patrick v. Insurance Co.*, 43 N. H. 621, 80 Am. Dec. 197.

³⁹ *Lebanon Mut. Ins. Co. v. Erb*, 112 Pa. 149, 4 Atl. 8; *Estes v. Insurance Co.*, 67 N. H. 462, 33 Atl. 515; *De Camp v. Insurance Co.*, Fed. Cas. No. 3,719.

or rejection of the risk.⁴⁰ He is usually held to bind the company by any interpretation he may give to the questions asked in the application,⁴¹ or by any knowledge he may acquire in the performance of his duties, so far as it is material to the transactions in which he is acting for the insurer. But he cannot ordinarily collect the first premium otherwise than in cash,⁴² or extend the time for the payment of premiums, or otherwise modify any of the terms of the printed contract.⁴³

"Local" agents are usually special agents, in the sense of having only limited authority, but local agents may have general powers.⁴⁴ In this case, as in all others of agency, the facts govern. If the facts of any case show that the agent was actually possessed of the power exercised, or that the third party had reasonable ground for believing that he was possessed of such power, the principal will be bound; otherwise he will not.⁴⁵ It makes not one particle of difference what may be the designation of the agent.

Same—Subordinate Lodges, etc.

Some interesting cases have arisen, involving the relation existing between the controlling board of the various benevolent orders, known variously as the "Supreme Lodge," or the "Grand Chapter," or by some similar appellation, and the several subordinate chapters or lodges and their officers. It is clearly one of limited or special agency. The functions and powers of the subordinate lodges cannot be other than

⁴⁰ *Oliver v. Insurance Co.*, 97 Va. 134, 33 S. E. 536. In this case no such preliminary contract was made, although the agent was empowered so to contract.

⁴¹ *Continental Life Ins. Co. v. Chamberlain*, 132 U. S. 304, 10 Sup. Ct. 87, 33 L. Ed. 341; *New Jersey Mut. Life Ins. Co. v. Baker*, 94 U. S. 610, 24 L. Ed. 268; *New York Life Ins. Co. v. Russell*, 77 Fed. 94, 23 C. C. A. 43; *Mutual Ben. Life Ins. Co. v. Robison*, 58 Fed. 723, 7 C. C. A. 444, 22 L. R. A. 325.

⁴² *Hoffman v. Insurance Co.*, 92 U. S. 161, 23 L. Ed. 539.

⁴³ *CRITCHETT v. INSURANCE CO.*, 53 Iowa, 404, 5 N. W. 543, 36 Am. Rep. 230.

⁴⁴ See *Continental Fire Ass'n v. Norris* (Tex. Civ. App.) 70 S. W. 769.

⁴⁵ Statutes have been passed in some of the states defining who are insurance agents, and determining their powers. Many of these statutes give the powers of "general agents" to all insurance agents, of whatever kind. See *Laws Iowa 1880*, p. 209, c. 211; *Code Ala. 1886*, § 1205; *Acts 18th Gen. Assem. Iowa*, c. 211, § 1; *Rev. St. Wis.* § 1977; *Sayles' Ann. Civ. St. Tex.* art. 2943a; 1 *Starr & C. Ann. St. Ill.* p. 1322. For the construction of these statutes, see *Mutual Ben. Life Ins. Co. v. Robison* (C. C.) 54 Fed. 580; *Noble v. Mitchell*, 100 Ala. 519, 14 South. 581, 25 L. R. A. 238; (same case) 164 U. S. 367, 17 Sup. Ct. 110, 41 L. Ed. 472; *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 20 N. E. 77, 11 Am. St. Rep. 121; *St. Paul Fire & Marine Ins. Co. v. Sharer*, 76 Iowa, 282, 41 N. W. 19; *Fred Miller Brewing Co. v. Council Bluffs Ins. Co.*, 95 Iowa, 31, 63 N. W. 565; *Schomer v. Insurance Co.*, 50 Wis. 575, 7 N. W. 544.

⁴⁵ *Hardin v. Insurance Co.*, 90 Va. 413, 18 S. E. 911; *McGonigle v. Insurance Co.*, 168 Pa. 1, 31 Atl. 868; *Sheppard v. Insurance Co.*, 21 W. Va. 368.

are given by the constitution and by-laws of the order, and with these each member is presumed to be acquainted. Hence the grand lodge can be bound only by such of the acts of the subordinate lodge or of its agents as are actually authorized.⁴⁶ But the supreme lodge cannot escape liability incurred through the authorized act of the subordinate lodge or its officers by asserting that such acts were done on behalf of the members. Thus, in *Supreme Lodge K. P. v. Withers*⁴⁷ the order sought to avoid payment of a death claim because of the default of the secretary of the local lodge, to whom the insured had paid his dues in accordance with the requirements of the laws of the order, in remitting to the grand lodge the sum received within the time required. A by-law of the order stipulated that the officers of the subordinate lodge should be the agents of the members; but the Supreme Court held that such a stipulation could not change the facts, and that the facts clearly showed that the subordinate lodge and its secretary were agents of the supreme lodge, and that a payment duly made to the secretary was made to the supreme lodge, which was therefore liable.⁴⁸ So when a subordinate lodge accepts dues from a member with full knowledge of a ground upon which his certificate might be forfeited, and pays the money received over to the grand lodge, the latter will be estopped to claim the forfeiture.⁴⁹ Nor will the refusal of the subordinate lodge to deliver a certificate to a member who has done everything to entitle him to the certificate enable the order to escape a just liability to the member.⁵⁰

Insurance Brokers.

An insurance broker is ordinarily one who is engaged in the business of procuring insurance for such persons as apply to him for that serv-

⁴⁶ *Clark v. Association*, 14 App. (D. C.) 154, 43 L. R. A. 390; *Supreme Commandery Knights of Golden Rule v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332; *Mutual Life Ins. Co. v. Young*, 23 Wall. (U. S.) 85, 23 L. Ed. 152; *Campbell v. Supreme Lodge*, 168 Mass. 397, 47 N. E. 109.

⁴⁷ 177 U. S. 260, 20 Sup. Ct. 611, 44 L. Ed. 762.

⁴⁸ In a Massachusetts case (*Campbell v. Supreme Lodge*, 168 Mass. 397, 47 N. E. 109), in which the defendant was the same as in the *Withers* Case, a contrary conclusion was reached under a similar state of facts. But in this case the question of agency was not considered. The court based its decision upon the fact that the money should have been received at the office of the board of control before the death of the member, and, as there was no custom by which the company took the risk of payments by mail, the money was not actually received before the death of the member. The member was not reinstated by the receipt given by the board of control, conditioned upon the member's being alive at its date.

⁴⁹ *High Court Independent Order of Foresters v. Schweitzer*, 171 Ill. 325, 49 N. E. 506.

⁵⁰ *Lorscher v. Supreme Lodge*, 72 Mich. 316, 40 N. W. 545, 2 L. R. A. 206.

ice.⁵¹ He is therefore usually the agent of the insured,⁵² and will be so considered even though a statute may declare that whoever "in any manner aids or assists" in making a contract of insurance "on behalf of any insurance corporation or property owner" shall be held to be an "agent of such corporation to all intents and purposes."⁵³ The broker is still the agent of the insured, though he may solicit the privilege of placing the insurance, and receive a commission from the insurer with whom it is placed.⁵⁴ But in any given case the facts may show that the broker was acting for the insurer as well as for the insured. For one purpose he may represent the insured; for another, the insurer.⁵⁵

⁵¹ Laws Mass. 1887, p. 825, c. 214, § 93, defines a broker as any person who, "for compensation, acts or aids in any manner in the negotiation of contracts of insurance or reinsurance, or placing risks or effecting insurance or reinsurance, for a person other than himself, and not being appointed agent or officer of the company in which such insurance or reinsurance is effected." "An insurance broker is one who acts as a middleman between the insured and the company, and who solicits insurance from the public under no employment from any special company, but, having secured an order, he either places the insurance with the company selected by the insurer, or, in the absence of any selection by him, then with the company selected by such broker." Per Peckham, J. *ARFF v. INSURANCE CO.*, 125 N. Y. 57, 25 N. E. 1073, 10 L. R. A. 609, 21 Am. St. Rep. 721. See *Sellers v. Insurance Co.*, 105 Ala. 282, 16 South. 798, defining an insurance broker. Also, see *Pratt v. Burdon*, 168 Mass. 596, 47 N. E. 419, defining a broker, and construing the Massachusetts statute quoted above. See, also, *Milliken v. Woodward*, 64 N. J. Law, 444, 45 Atl. 796.

⁵² *Fire Ass'n of Philadelphia v. Hogwood*, 82 Va. 342, 4 S. E. 617; *Allen v. Insurance Co.*, 123 N. Y. 6, 25 N. E. 309; *Continental Ins. Co. v. Allen*, 26 Ill. App. 576.

⁵³ *JOHN R. DAVIS LUMBER CO. v. HARTFORD FIRE INS. CO.*, 95 Wis. 226, 70 N. W. 84, 37 L. R. A. 131, construing section 1977, Rev. St. Wis. To same effect, see *United Firemen's Ins. Co. v. Thomas*, 82 Fed. 406, 27 C. C. A. 42, 53 U. S. App. 517, 47 L. R. A. 450. Same case on rehearing, 92 Fed. 127, 34 C. C. A. 240, 47 L. R. A. 450, construing Rev. St. Ill. c. 73, § 40.

⁵⁴ *Seamans, etc., v. Knapp, Stout & Co.*, 89 Wis. 171, 61 N. W. 757, 27 L. R. A. 362, 46 Am. St. Rep. 825; *American Fire Ins. Co. v. Brooks*, 83 Md. 22, 34 Atl. 373; *Devens v. Insurance Co.*, 83 N. Y. 163; *Sellers v. Insurance Co.*, 105 Ala. 282, 16 South. 798; *Commonwealth Mut. Fire Ins. Co. v. William Knabe & Co. Mfg. Co.*, 171 Mass. 265, 50 N. E. 516. In an Indiana case an intermediate broker to whom a broker applied for insurance was held to be the agent of the insurance company, so as to charge it with his knowledge regarding the premises insured. *Indiana Ins. Co. v. Hartwell*, 123 Ind. 177, 24 N. E. 100. The court seemed to reach this conclusion because of the intermediary relation of the broker, but it is contrary to the great weight of authority.

⁵⁵ Under the provisions of the Massachusetts statute (Acts 1887, p. 823, c. 214, § 90), an insurance broker is the agent of the insurer for the purpose of receiving the premium, notwithstanding any condition or stipulation in the policy to the contrary. But this does not make the broker the agent of the insurer so as to bind him by the broker's knowledge of the condition of the premises insured. *Davis v. Insurance Co.*, 67 N. H. 335, 39 Atl. 902. In Texas it has been held that he is agent of the insurer to receive premiums, but

The facts of the case will always govern. Thus the broker may act for the insured in procuring the insurance, and thus bind him by any concealments or representations made, and also act for the insurer in delivering the policy and settling for the premium, with reference to which the broker's acts will bind the insurer.⁵⁶ If, as a matter of fact, a broker has been authorized by several companies to make contracts on their behalf, his selection of one of the companies to carry a risk applied for has been held to complete a contract binding upon that company, even though the policy which the broker was authorized to issue was withheld because of an intervening fire.⁵⁷

Notice given to a broker authorized to procure insurance is to be considered notice to the insured as to any matters preceding the completion of the contract.⁵⁸ But ordinarily the authority of the broker to represent the insured ends with the completion of the contract, and any notice thereafter given to the broker will not affect the rights of the insured. This question most frequently arises when the insurer gives to the broker who procured the insurance notice of the cancellation of the contract, which, by the terms of the policy, is required to be given to the insured. But, in accordance with the principle stated above, such notice is not sufficient,⁵⁹ unless there is evidence of continued authority conferred upon the broker.⁶⁰

Executive Officers of Insurance Company.

It is sometimes said that it is a settled rule of agency "that officers of a corporation or association are special agents, whose powers are limited and prescribed by the charter or articles of association and by-laws, and that persons dealing with them are chargeable with notice of

for nothing else. *East Texas Fire Ins. Co. v. Blum*, 76 Tex. 653, 13 S. W. 572. In Pennsylvania he is not the agent of insurer to receive premiums. *Pottsville Mut. Fire Ins. Co. v. Minnequa Springs Imp. Co.*, 100 Pa. 137. In Illinois, whether the broker acted for the insurer in receiving the premium is held to be a question of fact. *Sun Mut. Ins. Co. v. Saginaw Barrel Co.*, 114 Ill. 99, 29 N. E. 477.

⁵⁶ *Sellers v. Insurance Co.*, 105 Ala. 282, 16 South. 798; *Hamblet v. Insurance Co. (D. C.)* 36 Fed. 118; *Milliken v. Woodward*, 64 N. J. Law, 444, 45 Atl. 796; *Gaysville Mfg. Co. v. Phoenix Mut. Fire Ins. Co.*, 67 N. H. 457, 36 Atl. 367; *East Texas Fire Ins. Co. v. Brown*, 82 Tex. 631, 18 S. W. 713.

⁵⁷ *Croft v. Insurance Co.*, 40 W. Va. 508, 21 S. E. 854, 52 Am. St. Rep. 902.

⁵⁸ *LIPMAN v. INSURANCE CO.*, 121 N. Y. 454, 24 N. E. 699, 8 L. R. A. 719.

⁵⁹ *Hermann v. Insurance Co.*, 100 N. Y. 411, 3 N. E. 341, 53 Am. Rep. 197; *Kehler v. Insurance Co. (C. C.)* 23 Fed. 709; *Grace v. Insurance Co.*, 109 U. S. 278, 3 Sup. Ct. 207, 27 L. Ed. 932; *American Fire Ins. Co. v. Brooks*, 83 Md. 22, 44 Atl. 373; *Zenos v. Wickham*, 2 H. L. Cas. 296; *Mutual Assur. Soc. v. Scottish Union & Nat. Ins. Co.*, 84 Va. 116, 4 S. E. 178, 10 Am. St. Rep. 819.

⁶⁰ *Royal Ins. Co. v. Wight*, 55 Fed. 455, 5 C. C. A. 200; *Standard Oil Co. v. Triumph Ins. Co.*, 64 N. Y. 85; *Hartford Fire Ins. Co. v. Reynolds*, 36 Mich. 502; *JOHN R. DAVIS LUMBER CO. v. HARTFORD FIRE INS. CO.*, 95 Wis. 226, 70 N. W. 84, 37 L. R. A. 131.

these limitations."⁶¹ But it is clear that the officers of a corporation are by no means special agents in the sense in which that term is ordinarily used, as explained above. It is true that the powers of such officers may be prescribed in terms by the charter, and are necessarily limited to those possessed by the corporation under its charter, and that they may be still further limited by by-laws and regulations adopted by the stockholders or directors, though it is to be here observed that such by-laws and regulations are conclusively presumed to be known only to members of the corporation.⁶² But in the active conduct of the business for the transaction of which the company was chartered, the executive officers usually possess all the powers of the corporation.⁶³ They would therefore more appropriately be called general agents, as exercising more general authority than any others of the representatives of the corporation.

Such executive officers bear divers titles, being denominated variously "president," "vice president," "secretary," "assistant-secretary," "treasurer," "superintendent," or "general manager"; or, if the association be one established for fraternal or benevolent purposes, the titles of the executive officers are often fairly imperial in their suggestion of authority. These titles do not of themselves fix the powers of their possessors, but the giving of a title having a customary significance as to accompanying authority is often an important fact justifying an inference of authority by third persons. For the general public, in the case of these executive officers as well as of other agents, has a right to infer that ostensible authority is actual authority. Thus, as the president of any organization generally possesses authority to supervise and regulate the conduct of all its affairs, the public naturally assumes that the person appointed to be president of an insurance company has authority to bind the company by any act that he may do in furtherance of the business in which it is engaged.⁶⁴ The company, of course, can limit these

⁶¹ See 1 Joyce, Ins. § 397.

⁶² The by-laws and regulations of a corporation are not presumed to be known to persons with whom its agents deal unless they are specially brought to their knowledge. *Rathbun v. Snow*, 123 N. Y. 343, 25 N. E. 379, 10 L. R. A. 355, *Clark, Corp.* 461.

⁶³ *Hackney v. Insurance Co.*, 4 Pa. 187. What the officers of an insurance company say and do when in the discharge of their duties as officers, and in relation to duties assigned them, is evidence against the company. *Muhleman v. Insurance Co.*, 6 W. Va. 508. See, also, *German Ins. Co. v. Gray*, 43 Kan. 497, 23 Pac. 637, 8 L. R. A. 70, 19 Am. St. Rep. 150. A provision in a policy that its terms cannot be waived or changed by any agent or officer of the company, except in writing, is invalid in so far as it attempts to restrict the power of the company to act through its executive officers. *LAMBERTON v. INSURANCE CO.*, 39 Minn. 129, 39 N. W. 76, 1 L. R. A. 222. See *Renier v. Insurance Co.*, 74 Wis. 89, 42 N. W. 208; *Weed v. Insurance Co.*, 116 N. Y. 117, 22 N. E. 229.

⁶⁴ *Dilleber v. Insurance Co.*, 76 N. Y. 567; *Merchants' & Manufacturers'*

apparent powers, but the limitation, to be effective, must be communicated. So the secretary has customarily somewhat less extensive powers, but has, impliedly, authority to do all acts properly incident to the duties of his office.⁶⁵ And the same is true of the treasurer.⁶⁶ The general manager or superintendent usually has within the territory under his control very much the same authority as the president, and exercises all the administrative powers of the corporation.⁶⁷

The board of directors are not executive officers, and a discussion of their powers belongs more properly to a work on the general law of corporations⁶⁸ than to a treatise on insurance. It has already been

Ins. Co. v. Curran, 45 Mo. 142, 100 Am. Dec. 361. He may waive a deviation from the risk when such is in accordance with a uniform practice of the company. *Warren v. Insurance Co.*, 16 Me. 439, 33 Am. Dec. 674. Knowledge of the president is knowledge of the company. *Pomeroy v. Insurance Co.*, 9 Colo. 295, 12 Pac. 153, 59 Am. Rep. 144. But in Massachusetts it is held that the president of a mutual company has no authority to waive conditions of a policy dependent upon the by-laws, and make a different contract from that authorized by such by-laws. *Priest v. Insurance Co.*, 3 Allen, 602. He has no power to waive a by-law requiring prepayment of the premium as a condition precedent to the validity of the policy. *Baxter v. Insurance Co.*, 1 Allen (Mass.) 294, 79 Am. Dec. 730. Where the president is held out as having authority to make oral contracts for insurance, third persons are not affected by secret limitations on his authority. *Commercial Mut. Ins. Co. v. Union Ins. Co.*, 19 How. (U. S.) 318, 15 L. Ed. 636.

⁶⁵ It is the secretary's duty to carry into effect the votes and directions of the managing body, unless the contrary appears. *Leary v. Blanchard*, 48 Me. 269. The assignee of a life policy is justified in concluding that it has been canceled by the company where he receives a letter from its secretary stating that all policies were canceled by the company for failure to pay assessments within thirty days. *Columbia Ins. Co. v. Masonheimer*, 76 Pa. 133. Where the secretary of an insurance company fills out an application for insurance, the company will be presumed to have waived any statements of facts not inserted in the application. *Tiefenthal v. Insurance Co.*, 53 Mich. 306, 19 N. W. 9.

The secretary of a corporation is one of the general managing agents, and, when in the discharge of the duties of his office, represents the company. *Hastings v. Insurance Co.*, 138 N. Y. 473, 34 N. E. 289. But the secretary cannot bind the company by his agreement to pay a loss for which the insurer is not otherwise liable. *Arguimbau v. Insurance Co.*, 106 La. 139, 30 South. 148. Nor, it is held, can the secretary give by letter consent to other insurance, required by the policy to be indorsed thereon. *O'Leary v. Insurance Co.*, 100 Iowa, 173, 69 N. W. 420, 62 Am. St. Rep. 555. But quare?

⁶⁶ *Stark Bank v. United States Pottery Co.*, 34 Vt. 144. But he has no authority to borrow money to pay benefits in an association. *Screwmen's Ben. Ass'n v. Smith*, 70 Tex. 168, 7 S. W. 793. It has been held that the fact that the treasurer of a mutual company received assessments from the insured after he knew of the misrepresentations as to his age does not validate the policy. *Swett v. Society*, 78 Me. 541, 7 Atl. 394.

⁶⁷ See *Eclectic Life Ins. Co. v. Fahrenkrug*, 68 Ill. 463; *McGurk v. Insurance Co.*, 58 Conn. 528, 16 Atl. 263, 1 L. R. A. 563.

⁶⁸ See *Clark, Corp.* n. 485 et seq.

shown that the directors have no power to adopt by-laws or to order assessments, except in strict compliance with the charter or articles of association, and unless they are reasonable.⁶⁹ It may be here added that notice to a director is not notice to the company, unless the circumstances are such as to make it the duty of that director to communicate his knowledge.⁷⁰

Other Agents.

Adjusters, appraisers, medical examiners, and attorneys are strictly special agents, whose authority to bind the company is narrowly confined to acts incident to the discharge of the special functions for which they are employed.⁷¹ Thus an agent authorized to adjust a loss may waive proofs of loss,⁷² but cannot revive an already forfeited policy.⁷³ Yet it has been held that he may bind the insurer by stating grounds for his refusal to settle the loss, thus waiving a forfeiture on other grounds.⁷⁴ In Michigan⁷⁵ it has been decided that the offer made by an adjuster to compromise a disputed claim did not amount to a waiver, binding on the company, of a forfeiture incurred under a term of the policy.

A medical examiner has narrow authority, but within the limits of that authority he may bind the insurer by his acts, or by knowledge acquired. Thus it is held⁷⁶ that the knowledge of a medical examiner of the truth of a fact or circumstance erroneously set forth in an application will estop the insurer to claim a forfeiture on the ground of misrepresentation.

⁶⁹ See *supra*, 194.

⁷⁰ See *Clark, Corp.* p. 502. See, also, *General Ins. Co. v. United States Ins. Co.*, 10 Md. 517, 69 Am. Dec. 174.

⁷¹ *Dwelling House Ins. Co. v. Snyder*, 59 N. J. Law, 18, 34 Atl. 931.

⁷² *Germania Fire Ins. Co. v. Pitcher*, 160 Ind. 392, 64 N. E. 921; *Ætna Ins. Co. v. Shryer*, 85 Ind. 362. See numerous cases cited in 28 Cent. Dig. "Insurance," § 1406.

⁷³ *Phoenix Ins. Co. v. Lawrence*, 4 Metc. (Ky.) 9, 81 Am. Dec. 521.

⁷⁴ *Rockford Ins. Co. v. Williams*, 56 Ill. App. 338.

⁷⁵ *Richards v. Insurance Co.*, 83 Mich. 508, 47 N. W. 350, 21 Am. St. Rep. 611. But a compromise completed by the adjuster is binding on the company in the absence of knowledge by the insured of limitations upon the adjuster's authority. *Millers' Nat. Ins. Co. v. Kinneard*, 136 Ill. 199, 26 N. E. 368.

⁷⁶ *Grattan v. Insurance Co.*, 80 N. Y. 281, 36 Am. Rep. 617. See, also, *Sternaman v. Insurance Co.*, 170 N. Y. 13, 62 N. E. 763, 57 L. R. A. 318, 83 Am. St. Rep. 625; *Providence Life Assur. Soc. v. Rentlinger*, 58 Ark. 528, 25 S. W. 835; *Equitable Life Ins. Co. v. Hazlewood*, 75 Tex. 338, 12 S. W. 621, 7 L. R. A. 217, 16 Am. St. Rep. 893. A contrary doctrine to the text is held in *Leonard v. Assurance Co.*, 24 R. I. 7, 51 Atl. 1049, 96 Am. St. Rep. 698. But this decision was based on the ground that the advice given by the examiner did not relate to the medical certificate, and therefore was not binding on the insurer.

SUBAGENTS—THEIR APPOINTMENT AND POWERS.

111. Under the law of principal and agent, an agent is not allowed to delegate to another the authority conferred upon him, unless
 - (a) The power delegated involves the doing of a ministerial act only, or unless
 - (b) The delegation of such authority has been expressly or impliedly authorized by the principal.
112. The insurer will be deemed to have impliedly authorized the delegation of authority conferred upon his agent, if, under the circumstances of the agency, the appointment of subagents was
 - (a) Necessary to the accomplishment of the purposes of the agency; or
 - (b) In accordance with a custom or usage; or
 - (c) In accordance with the known practice or custom of the agent appointed.
113. A subagent may bind the insurer by exercising all the apparent powers of the agent, provided the agent has clothed him with such powers before the public.

It is a fundamental principle of the law of principal and agent that, when one person appoints another to perform any act involving the exercise of judgment or discretion, the person so making the appointment has the right to rely upon his employé to personally discharge the duty intrusted to him, and the latter has no right to delegate to another the performance of that which should be done by himself. This principle finds expression in the familiar maxim, "Delegatus non potest delegare."⁷⁷

This principle of agency, however, is only applicable in case the character of the act to be performed is such as to require the exercise of skill or discretion, or when the agent is appointed because he possesses peculiar qualities of fitness for the discharge of the particular duty intrusted to him. Thus an agent may delegate to another the performance of ministerial acts, and his subagent or clerk employed to perform such acts may, when acting within the scope of his employment, bind the principal, though no immediate contractual relation exists between them.⁷⁸ Manifestly it would be impossible for the agent

⁷⁷ *Davis v. King*, 66 Conn. 465, 34 Atl. 107, 50 Am. St. Rep. 104; *Kohl v. Beach*, 107 Wis. 409, 83 N. W. 657, 50 L. R. A. 600, 81 Am. St. Rep. 849; *Lyon v. Jerome*, 26 Wend. (N. Y.) 485, 37 Am. Dec. 271; *Inhabitants of Town of Stoughton v. Baker*, 4 Mass. 522, 3 Am. Dec. 236; *White v. Davidson*, 8 Md. 169, 63 Am. Dec. 699. See *Tiff. Ag.* p. 116.

⁷⁸ *Grady v. Insurance Co.*, 60 Mo. 116; *McKinnon v. Vollmar*, 75 Wis. 82, 43 N. W. 800, 6 L. R. A. 121, 17 Am. St. Rep. 178; *Sayre v. Nichols*, 7 Cal. 535, 68 Am. Dec. 280; *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 20 N.

to give his personal attention to every trivial clerical matter, and the principal cannot fail to know that such matters are usually intrusted to subordinates. An agent may also be authorized to appoint subagents to discharge certain duties, or the nature of the business in which he is engaged may be such that it is to be presumed that the principal intended that he should employ others to aid him in the discharge of his duties. In case the agent is expressly authorized to make such appointments, clearly the principal is liable for the acts of the subagent, within the scope of the authority conferred upon him. When, however, the agent has, at most, only an implied authority to appoint a subagent, it is often difficult to determine whether such authority actually exists, so as to fasten liability on the principal for the acts of the subagent.

In cases of express authorization, no peculiar difficulty presents itself in the law of insurance. As in all other cases, the subagent acting within the scope of his employment becomes the agent of the principal.⁷⁹ Passing, however, to a consideration of the question as to when an insurance company may be considered as having impliedly authorized its agent to appoint a subagent, certain considerations peculiar to the law of insurance should be noticed.⁸⁰ The company will be presumed to have known that the agent would employ a subordinate, (1) if the necessities of the business intrusted to the agent are such as to require the services of others; or (2) there is a general custom among insurance companies to allow such appointments for certain purposes; or (3) where the known previous custom of the agent has been such as to warrant the belief that he will employ another to discharge certain of his duties.

Authority Implied from Necessity.

Where a general agent is appointed to conduct the business of an insurance company throughout a considerable territory, the company must know that the duties of the agent can only be properly discharged if he appoints subagents to solicit insurance, and attend to the business incident thereto, within certain districts or subdivisions of the territory

E. 77, 11 Am. St. Rep. 121; Runkle v. Insurance Co. (C. C.) 6 Fed. 143; McCroskey v. Hamilton, 108 Ga. 640, 34 S. E. 111, 75 Am. St. Rep. 79.

⁷⁹ See Aetna Life Ins. Co. v. Fallow (Tenn.) 77 S. W. 937.

⁸⁰ The usual services required of an insurance agent are not of so personal a nature as to come under the maxim, "Delegatus non potest delegare."

An agent, however, can only delegate to another such powers as he possesses himself. Duluth Nat. Bank v. Knoxville Fire Ins. Co., 85 Tenn. 76, 1 S. W. 689, 4 Am. St. Rep. 744. As to who is a general agent, and has, as such, the power to delegate to others all duties incident to the conduct of the business of insurance, see May, Ins. § 126; Goode v. Insurance Co., 92 Va. 392, 23 S. E. 744, 30 L. R. A. 842, 53 Am. St. Rep. 817; Continental Ins. Co. v. Ruckman, 127 Ill. 364, 20 N. E. 77, 11 Am. St. Rep. 121; Flynn v. Insurance Co., 78 N. Y. 568, 34 Am. Rep. 561.

See, also, supra, p. 307.

assigned to the agent. In such a case the act of the subagent is binding upon the company, to the same extent as if he owed his appointment to the company itself, and not to the agent.⁸¹

So other cases may arise in which the business of the insurance agent is of such a character as to clearly necessitate the appointment of a subagent. As has been said by the West Virginia court in a leading case: "Insurance agents are not bound to attend to all the details of their business in person, and, if they could not authorize their clerks or other assistants to carry on the business and renew policies, or contract in reference to them, they would frequently, in case of sickness or absence, have to close their offices altogether."⁸²

Authority Implied from Custom or Usage.

A general custom or usage on the part of insurance companies to allow the appointment of subagents by the general agents of the company will estop the company from denying liability for the act of the subagent, if within the scope of the agent's authority. The custom or usage thus relied on to impose a liability on the insurer owes its origin in most instances to the fact that the appointment of subagents is necessary to the proper conduct of the business of the company, and hence we find that the courts, in many cases, base their decisions holding that implied authority to make appointment of subagents exists upon the grounds of necessity or custom, indifferently.⁸³

⁸¹ Insurance Co. of North America v. Thornton, 130 Ala. 222, 30 South. 614, 55 L. R. A. 547, 89 Am. St. Rep. 30; Krumm v. Insurance Co., 40 Ohio St. 225; Swan v. Insurance Co., 96 Pa. 37; Franklin Fire Ins. Co. v. Bradford, 201 Pa. 32, 50 Atl. 286, 55 L. R. A. 408, 88 Am. St. Rep. 770; Aetna Life Ins. Co. v. Fallow (Tenn.) 77 S. W. 937.

⁸² Deitz v. Insurance Co., 33 W. Va. 526, 11 S. E. 50, 25 Am. St. Rep. 908. See, also, Goode v. Insurance Co., 92 Va. 392, 23 S. E. 744, 30 L. R. A. 842, 53 Am. St. Rep. 817. In a leading New York case, Peckham, J., in delivering the opinion of the court, uses the following language: "Enough has been said to show that an agent of an insurance company has the right to, and, indeed, it is the expectation of the company that he will, employ such clerks and other assistants as may be necessary and proper in order that he may do the business for which he has been appointed agent. Soliciting insurance is part of the business of such agents, and it is not to be assumed that such solicitation can be made only by the agents personally; nor can it be held, as a matter of law, that, when it is made by some person employed exclusively by them, such solicitation on the part of the person thus employed makes him an insurance broker, and takes away from him his character as clerk or employé of the agent." ARFF v. INSURANCE CO., 125 N. Y. 57, 25 N. E. 1073, 10 L. R. A. 609, 21 Am. St. Rep. 721.

⁸³ "Insurance companies know or ought to know when they appoint general agents that, according to the ordinary course of business, they have clerks and other persons to assist them, and that their agents in many instances could not transact the business intrusted to them if they were required to give their personal attention to all of its details. It being necessary, therefore, and according to the usual course of business, for their agents to employ

In a leading New York case, in which the company was held liable for the act of a subagent, the court states the reasons for its opinion as follows: "We know, according to the ordinary course of business, that insurance agents frequently have clerks to assist them, and that they could not transact their business if obliged to attend to all the details in person, and these clerks can bind their principals in any of the business which they are authorized to transact. An insurance agent can authorize his clerk to contract for risks, to deliver policies, to collect premiums, and to take payment of premiums in cash or securities, and to give credit for premiums in cash or securities, and to give credit for premiums, or to demand cash; and the act of the clerk in all such cases is the act of the agent, and binds the company just as if it were done by the agent in person."⁸⁴

Same—Custom of Particular Agent.

In the case cited it was also shown that the subagent had been acting as such for some years. Manifestly, where a previous custom or habit of the agent, known to the company, thus to delegate to another the performance of his duties, can be shown, the insurance company is estopped to deny that no authority exists for the appointment of the subagent.⁸⁵ Evidence of such a previous custom on the part of the insurance agent should always be admitted in order to determine whether the subagent has power to bind the company.⁸⁶

Extent to Which Subagent may Bind Insurer.

It would seem clear from the authorities already cited that the agent, having authority, either express or implied, to appoint a subagent, may delegate to the latter the performance of any of his duties, of however personal a character they may be, unless it is manifest that the insurer intended that certain of the powers of the agent should not be delegated.⁸⁷ In every case it becomes necessary to determine whether

others to aid them in doing the work, it is just and reasonable that insurance companies should be held responsible not only for the acts of their agents, but also for the acts of their agents' employes, within the scope of the agents' authority." *Goode v. Insurance Co.*, 92 Va. 392, 23 S. E. 744, 30 L. R. A. 842, 53 Am. St. Rep. 817. See, also, *Bodine v. Insurance Co.*, 51 N. Y. 117, 10 Am. Rep. 566; *Steele v. Insurance Co.*, 93 Mich. 81, 53 N. W. 514, 18 L. R. A. 85.

⁸⁴ *Bodine v. Insurance Co.*, 51 N. Y. 117, 10 Am. Rep. 566.

⁸⁵ *Bodine v. Insurance Co.*, 51 N. Y. 117, 10 Am. Rep. 566; *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 20 N. E. 77, 11 Am. St. Rep. 121; *MAYER v. INSURANCE CO.*, 38 Iowa, 304, 18 Am. Rep. 34.

⁸⁶ *ARFF v. INSURANCE CO.*, 125 N. Y. 57, 25 N. E. 1073, 10 L. R. A. 609, 21 Am. St. Rep. 721.

⁸⁷ To quote from the opinion in a recent Alabama case, in which the authorities are reviewed: "The power delegated to the agent in express terms being such as to require the services of subagents, carries with it the power to appoint subagents, whatever the nature of the service in respect of being

er the appointment of the subagent was authorized, and, if so, whether he has been clothed, before the public, with such powers as he seeks to exercise. If a person enters into a contract with the subagent, having no reason to believe that he has been authorized to make contracts which shall be binding on the insurer, the latter will clearly not be estopped to deny the authority of the subagent.⁸⁸

While, as before stated, the personal character of the duty to be discharged by the agent will not, as a rule, prevent the agent from delegating its performance to another, yet in certain cases a different view has been taken by the courts.⁸⁹ Probably the greatest difficulty in determining whether a subagent, without express authorization by the insurer, may exercise a power, has been found in cases involving the waiver of a condition of forfeiture by the subagent. It was held by the Alabama court that the power to waive such a condition was a personal trust, which the agent could not delegate to another without the knowledge or consent of the insurer.⁹⁰ A later case⁹¹ from the same state attempts to explain this decision as based, not upon the personal character of the power sought to be delegated, but rather upon the fact that there were no circumstances such as would indicate that the company by implication authorized the agent to appoint any subordinates.

Whether this is the real ground for the opinion rendered in the earlier case seems at least doubtful. It is certain, however, that in no other way can the decision in question be reconciled with the great weight of authority holding that the insurer is bound by the subagent's waiver of a condition in all cases in which the agent is authorized to make such a waiver and delegates this power to his subordinate.⁹²

in itself a personal confidence may be, for a principal may, of course, delegate to an immediate agent clothed with duties involving the exercise of personal skill and judgment, the power of devolving such duties upon subagents." *Insurance Co. of North America v. Thornton*, 130 Ala. 222, 30 South. 614, 55 L. R. A. 547, 89 Am. St. Rep. 30.

See, also, *Bodine v. Insurance Co.*, 51 N. Y. 117, 10 Am. Rep. 566, for an enumeration of many of the duties which it is held that a subagent may perform.

⁸⁸ *More v. Insurance Co.*, 130 N. Y. 537, 29 N. E. 757.

⁸⁹ *Waldman v. Insurance Co.*, 91 Ala. 170, 8 South. 666, 24 Am. St. Rep. 883; *Lynn v. Burgoyne*, 13 B. Mon. (Ky.) 400. See, also, *Phoenix Ins. Co. v. Spiers & Thomas*, 87 Ky. 285, 8 S. W. 453, where it is held that, although an agent may delegate certain of his powers to a subagent, yet in this particular case the subagent could not be regarded as the agent of the company, because he acted under a mere private arrangement with the agent.

⁹⁰ *Waldman v. Insurance Co.*, 91 Ala. 170, 8 South. 666, 24 Am. St. Rep. 883.

⁹¹ *Insurance Co. of North America v. Thornton*, 130 Ala. 222, 30 South. 614, 55 L. R. A. 547, 89 Am. St. Rep. 30.

⁹² *Bodine v. Insurance Co.*, 51 N. Y. 117, 10 Am. Rep. 566; *ARFF v. INSURANCE CO.*, 125 N. Y. 57, 25 N. E. 1073, 10 L. R. A. 609, 21 Am. St. Rep. 721; *Goode v. Insurance Co.*, 92 Va. 392, 23 S. E. 744, 30 L. R. A. 842, 53 Am.

It naturally follows from the fact that a subagent may waive a condition that he may also insert one in the policy which will be binding upon the insurer, provided the principal agent could do so.

LIMITATIONS UPON THE POWERS OF AGENTS.

114. Any limitations whatsoever imposed by the insurer upon the authority of his agent will be binding upon the third parties dealing with the agent, provided they are
 - (a) Properly communicated;
 - (b) Legally proper, or not opposed to public policy.
115. Limitations upon the insurance agent's authority may be communicated in any of the following ways:
 - (a) In the policy, when such limitations will be valid as to those acts of the agent that are subsequent to the delivery of the policy, but invalid as to acts prior to that time.
 - (b) In the application, when they will be binding upon the insured, who has signed the application, even though not actually known to him.
 - (c) By oral communication, or by writing not immediately connected with the contract made. Such limitations, when proved, are clearly binding as to all subsequent transactions.
116. Improper limitations are such as are unreasonable, as involving an untruth, or contrary to public policy, as contravening a settled rule of law. The most important of such limitations, as most frequently occurring, are
 - (a) That no agent of the company is authorized to alter or waive any condition of the policy save in a specified manner. Such a statement is untrue of any agent having general contracting powers. No agent can limit his own powers, and the power to impose a condition implies the power to remove it.
 - (b) That the agent of the insurer, so far as taking the application is concerned, shall be deemed the agent of the insured. Such a limitation is unreasonable, as contrary to fact.
 - (c) That the insurer shall not be charged with knowledge acquired by his agent in the course of his employment. This limitation essays to set aside a settled rule of law, and is therefore contrary to public policy.
 - (d) That the insurer shall not be chargeable with the fraud of his agents. Such a limitation is clearly contrary to public policy.
117. By the weight of authority, these improper limitations are not enforceable, and do not in any wise affect the rights of the insured.

As has already been stated, it is competent for any principal to limit the apparent authority of his agent to any extent that seems best to him. It is also true that every agent's authority is presumed to be co-

St. Rep. 817; *Grubbs v. Insurance Co.*, 108 N. C. 472, 13 S. E. 236, 23 Am. St. Rep. 62; *Hartford Fire Ins. Co. v. Josey*, 6 Tex. Civ. App. 290, 25 S. W. 635; *Steele v. Insurance Co.*, 93 Mich. 81, 53 N. W. 514, 18 L. R. A. 85.

extensive with his employment. Therefore it follows that any limitations that the principal may desire to place upon the authority which a third party reasonably supposes the agent to be vested with must be made known; otherwise they are altogether inoperative. There is, however, another limitation upon the right of the principal to restrict the apparent power of his agent. He will not be allowed by any seeming restriction imposed upon his agent's authority to set aside any settled rule of law which has its basis in public policy, whether that public policy be declared by statute, or by a series of consistent adjudications. The maxim, "*Qui facit per alium facit per se*," gives expression to a profound truth relative to the law of agency; that is, whatever is done by an agent in the course of his performance of the duty with which he is charged by the principal must necessarily and in all cases be deemed to have been done by the principal.²² And this fundamental truth cannot be annulled or evaded by the use of any language, or by the terms of any agreement which the parties may make. The rule is fundamental, and inexorable in its application.²⁴

Persons employed as agents, in common with other persons, sometimes make serious mistakes, and not infrequently they are guilty of dishonest practices. Such mistakes and fraudulent acts on the part of the agents usually result in injury and loss. The insurance company, compelled to transact all its business through agents, naturally desires to safeguard itself against losses incident to the neglect or lack of fidelity of its agents, and, in order to do so, fills its policies and other instruments used in negotiating insurance contracts with conditions, the purpose of which is to cast this burden, as far as may be, upon the third party dealing with its agents. If all these conditions were given effect, the benefits for which the insured supposes he is contracting would seldom be received. The courts are, however, careful to so construe these limitations as to preserve the rights of the insured as far as is in any wise consistent with the rules of the law of contracts. Much confusion has naturally arisen in the decisions of the numerous courts before which cases involving the validity of such limitations have come, and it is impossible to reconcile all of them either with one another, or with any harmonizing principle of law. Consequently no effort will be made to set out the conflicting doctrines of all the cases, but an attempt will rather be made to state the law with reference to the validity of limitations upon the agent's authority, in accordance with reason and sound principle, and as supported by the better authority. We will therefore first state what constitutes a sufficient communication of these limitations to the third party dealing with the

²² *Tit. Ag.* p. 10.

²⁴ *UNION MUT. LIFE INS. CO. v. WILKINSON*, 13 Wall. 222, 20 L. Ed. 617.

insurance agent, and what are the effects of the several modes of communication.

Limitations upon Agent's Authority Contained in the Policy.

Almost without dissent it is held that the person who accepts a policy of insurance is, in the absence of fraud, conclusively presumed to know and assent to all the terms of the policy;⁹⁵ therefore a limitation upon the power of the insurance agent, set forth in the policy, must be considered as communicated to the insured, whether actually known to him or not, and therefore binding upon him as to the acts done by the agent subsequently to the delivery of the policy. Therefore, if in the policy it is provided that no agent can waive any condition in the policy, except in writing, indorsed thereon, such a limitation will be enforced unless other facts show that the insurer, by his conduct, has subsequently extended the powers of the agent so as to authorize a waiver otherwise than as provided by the policy.⁹⁶ Or, to state the rule generally, while a provision of the policy limiting the authority of the agent is valid and enforceable as to subsequent acts, if kept true, yet this provision, like any of the terms of a written contract, may be subsequently altered or annulled by parol agreement expressed or implied. And if, as a

⁹⁵ NEW YORK LIFE INS. CO. v. FLETCHER, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934; Walsh v. Insurance Co., 73 N. Y. 5; Cleaver v. Insurance Co., 65 Mich. 527, 32 N. W. 660, 8 Am. St. Rep. 908; Gould v. Insurance Co., 90 Mich. 302, at page 308, 51 N. W. 455; Burlington Ins. Co. v. Gibbons, 43 Kan. 15, 22 Pac. 1010, 19 Am. St. Rep. 118; Marvin v. Insurance Co., 85 N. Y. 278, 39 Am. Rep. 657; Carey v. Insurance Co., 84 Wis. 90, 54 N. W. 18, 20 L. R. A. 267, 36 Am. St. Rep. 907. But some courts, repudiating the above doctrine, to some extent, hold that the law does not impose upon the applicant the absolute duty to read his policy. This seems to be the case when the contract, as it appears in the policy, has been materially altered from the agreement made between the insured and the insurance agent without the knowledge of the former. Thus, where an applicant, mistakenly thinking that the policy conformed to the original agreement which he made with the insurance company in regard to the amount of additional insurance, failed to examine the policy, it was held that he had a right to rely upon the knowledge of the agent in regard to the amount of additional insurance to be taken. Fireman's Fund Ins. Co. v. Norwood, 69 Fed. 71, 16 C. C. A. 136. In an Indiana case it is said: "The assured is justified in assuming that the agent has in good faith correctly recorded his answers to the questions asked him, and, where he has in good faith made truthful answers, he is not chargeable with negligence if he signs the application thus prepared without reading it. When the company sends out its accredited agents to solicit insurance, those to whom such agents may apply have a right to rely upon the credit thus given them by their principal; and, if the agents act dishonestly, the dishonesty should be charged to their principal." Michigan Mut. Life Ins. Co. v. Leon, 138 Ind. 636, 37 N. E. 584, per Coffey, J. Also, see Kister v. Insurance Co., 128 Pa. 553, 18 Atl. 447, 5 L. R. A. 646, 15 Am. St. Rep. 696; Germania Life Ins. Co. v. Lunkenheimer, 127 Ind. 536, 26 N. E. 1082, and cases there cited.

⁹⁶ KNICKERBOCKER LIFE INS. CO. v. NORTON, 96 U. S. 234, 24 L. Ed. 689.

matter of fact, the insurer has subsequently given to the agent the powers that were denied in the policy, he cannot afterwards be heard to say that the provision of the policy shall govern.⁹⁷

But as to transactions that have taken place prior to the delivery of the policy, an entirely different rule applies. While engaged in these transactions with the agent the third party has as yet received no notice of limitations in the policy, and has a right to suppose that he is authorized to do all acts connected with the business intrusted to him.⁹⁸ Therefore these restricting provisions in the policy will not affect the rights of the insured as to any act done before the delivery of the policy. Thus it is held, with little dissent, that a stipulation in the policy that the agent taking the application shall be deemed the agent of the insured will not prevent the insurer from being bound by any acts done by the agent in taking the application, or by any information communicated to the agent at that time.⁹⁹

Limitations Contained in the Application.

On account of the decisions of the courts that limitations contained in the policy could have no effect as to transactions prior to the delivery of the policy, insurers began to resort to the application as the means of communicating such restrictions as they saw fit to impose upon the authority of their agents. The application, which is necessarily the first step in the negotiations for the procurement of insurance, when signed by the applicant, should, in all cases, in the absence of fraud on the part of the agent, bind the insured absolutely, as consenting to, and making his own, every statement set forth therein.¹⁰⁰ The application, in effect, contains the terms of an offer, which, upon acceptance by the insurer, become the terms of a contract to which the insured must necessarily be presumed to have consented. But the consent so given by the insured may, as in the case of other contracts, be vitiated by any fraudulent practice through which it was procured.¹⁰¹ Accordingly it has been held¹⁰² that a stipulation which had been inserted in

⁹⁷ See this point clearly discussed in Knickerbocker Life Ins. Co. v. Norton, *supra*.

⁹⁸ UNION MUT. LIFE INS. CO. v. WILKINSON, 13 Wall. 222, 20 L. Ed. 617.

⁹⁹ KAUSAL v. INSURANCE CO., 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776.

¹⁰⁰ Cuthbertson v. Insurance Co., 96 N. C. 480, 2 S. E. 253; School Dist. No. 4 v. Insurance Co., 61 Mo. App. 597; NEW YORK LIFE INS. CO. v. FLETCHER, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934; Virginia Fire & Marine Ins. Co. v. Morgan, 90 Va. 290, 18 S. E. 191.

¹⁰¹ Smith v. Insurance Co., 173 Pa. 15, 33 Atl. 567; Continental Ins. Co. v. Pearce, 39 Kan. 396, 18 Pac. 291, 7 Am. St. Rep. 557; Fireman's Fund Ins. Co. v. Norwood, 69 Fed. 71, 16 C. C. A. 136; McMaster v. Insurance Co., 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. 64.

¹⁰² McMaster v. Insurance Co., 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. 64.

an application by the agent, after it was signed by the insured, and without his consent, was not binding upon the insured, even though he afterwards accepted a policy to which was attached a copy of the application containing the unauthorized insertion. In this case it affirmatively appeared that the insured did not read the policy when delivered to him, having been induced by the statement of the agent to believe that it was written in accordance with his instructions. It seems clear that if the insured had actual knowledge of the fraud of the agent, by which a stipulation not then agreed to was inserted in the application, the insured would be estopped to deny that he had consented to it.¹⁰³ But in order to work such an estoppel against the insured to show the fraud of the agent, he must have had actual knowledge, and not merely constructive knowledge, of that fraud; and it has been held by the federal Supreme Court¹⁰⁴ that mere failure to read the policy, and thus to discover the fraud, did not amount to such negligence as would estop the insured to deny that he had given his consent to the fraudulent term.

But with these exceptions, the insured is charged with knowledge of everything written in the application above his signature, whether actually brought to his notice or not. It is his duty to read the application before signing it, and, if he fails to perform this duty, which he owes to his own interest, as well as to the insurer, he will not be heard, in a court of law, to say that he did not know or consent to any overlooked stipulation.¹⁰⁵ Therefore the insured is held to be charged with notice of any valid limitation upon the authority of the insurer's agent that may be set forth in the application. And such limitations are effective as to all acts done by the agent in the making of the insurance contract.¹⁰⁶

¹⁰³ NEW YORK LIFE INS. CO. v. FLETCHER, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934; Blooming Grove Mut. Fire Ins. Co. v. McAnerney, 102 Pa. 335, 48 Am. Rep. 209; Centennial Mut. Life Ins. Ass'n v. Parham, 80 Tex. 518, 16 S. W. 316. But it was held in a Texas case that it was immaterial that the insured knew that the statements inserted in the application were false, and made them to deceive the company and obtain the policy, if the agent knew the facts of the case, as knowledge of the agent was notice to the company, and it was liable on the policy. Sun Life Ins. Co. v. Phillips (Tex. Civ. App.) 70 S. W. 603.

¹⁰⁴ McMaster v. Insurance Co., 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. 64.
¹⁰⁵ See NEW YORK LIFE INS. CO. v. FLETCHER, 117 U. S. 519, at page 530, 6 Sup. Ct. 837, 29 L. Ed. 934, at page 938. Also, see Cleaver v. Insurance Co., 65 Mich. 527, 32 N. W. 660, 8 Am. St. Rep. 908.

¹⁰⁶ NEW YORK LIFE INS. CO. v. FLETCHER, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934; Bartholomew v. Insurance Co., 25 Iowa, 507, 96 Am. Dec. 65; Globe Mut. Life Ins. Co. v. Wolff, 95 U. S. 329, 24 L. Ed. 387; Galbraith's Adm'r v. Insurance Co., 12 Bush (Ky.) 29; RYAN v. INSURANCE CO., 41 Conn. 168, 19 Am. Rep. 490. But to the contrary, see Tubbs v. Insurance Co., 84 Mich. 646, 48 N. W. 296; Continental Ins. Co. v. Pearce, 39 Kan. 396, 18 Pac. 291, 7 Am. St. Rep. 557.

In many states statutes have been passed providing that the conditions of the application shall not affect the rights of the insured, unless a copy of such application shall be attached to the policy,¹⁰⁷ or, as required by the Virginia statute,¹⁰⁸ unless such conditions or restrictions are printed in type of a certain size. These statutes are constitutional, and are strictly enforced by the courts in order to prevent forfeitures.

Improper Limitations.

Granting that restrictions upon the authority of an agent are properly communicated, or even assuming that such restrictions are made the subject of formal and unquestioned agreement, still there are some of these restrictions that will not be enforced by the courts. It now becomes necessary to determine what limitations belong to this class, which have been denominated improper limitations. It is to be observed at the outstart of this discussion, which involves some questions of great difficulty, that in most instances the invalidity of an attempted limitation rests upon the equitable doctrine of estoppel; and that the insured, claiming the benefit of such a doctrine, must come into court with clean hands.

Same—Restrictions Extending to All Agents.

Stipulations are frequently found in policies, and sometimes in applications, to the effect that no agent or representative of the insurer can exercise specified powers, save in a manner designated. The most frequently occurring of these stipulations is that prohibiting any waiver of any condition in a policy, save in writing, indorsed on the policy; such indorsements to be made by some specified officer. Such a restriction is valid enough, as far as it restricts the power of inferior agents not having full contracting powers;¹⁰⁹ but it cannot have any effect whatsoever in restricting the authority of a so-called general agent, having full power of contracting for insurance on behalf of his company.¹¹⁰ An agent who has authority to make a contract upon

¹⁰⁷ See supra, p. 184.

¹⁰⁸ See Code 1887, § 3252; and see Dupuy v. Insurance Co. (C. C.) 63 Fed. 680, holding the above statute constitutional. This statute was held to apply only to the restrictive conditions of the policy, and not to the general indemnity clause of the policy. Cline v. Assurance Co. (Va.) 44 S. E. 700.

¹⁰⁹ KYTE v. ASSURANCE CO., 144 Mass. 43, 10 N. E. 518; Cleaver v. Insurance Co., 65 Mich. 527, 32 N. W. 660, 8 Am. St. Rep. 908; Bernard v. Association, 11 Misc. Rep. 441, 32 N. Y. Supp. 223; Porter v. Insurance Co., 160 Mass. 183, 35 N. E. 678; O'Brien v. Prescott Ins. Co., 134 N. Y. 28, 31 N. E. 265; Marvin v. Insurance Co., 85 N. Y. 278, 39 Am. Rep. 637; Gould v. Insurance Co., 90 Mich. 302, 51 N. W. 455.

¹¹⁰ Bankers' & Merchants' Mut. Ben. Ass'n v. Stapp, 77 Tex. 517, 14 S. W. 168, 19 Am. St. Rep. 772; Marcus v. Insurance Co., 68 N. Y. 625; Hartford Life & Annuity Co. v. Hayden's Adm'r, 90 Ky. 39, 13 S. W. 585. It is said

such terms as seem advisable to him can include or omit such of the terms of a printed form of contract as may be agreed upon. If it be necessary to add to the printed form, he may attach a "rider," or, if it is found desirable to strike out any term of the printed form, he may also do that, even though the term struck out be the one purporting to limit his authority in regard to waivers. This rule is a necessary consequence of the nature of a restriction upon authority, which must have its source in some authority of a higher order than that upon which it is imposed. It is impossible for any person to put a valid limitation upon his own power of contract.¹¹¹ A man would as well attempt to raise himself by his own boot straps as to limit, by any self-imposed restrictions, powers conferred upon him by a principal. Therefore the general rule may be stated that any limitation contained in the policy or application upon the powers of an agent having full authority to make and issue policies of insurance, and having, in that behalf, the powers of his principal, will be altogether inoperative, as repugnant and contrary to truth.¹¹²

In applying the general rule as thus stated to particular cases, consideration must be given to the circumstances under which the restriction is sought to be imposed. The cases most frequently arising in

in an Indiana case: "Whatever may be the rule as to applications prepared by special agents, where the assured has knowledge of the limitations upon his authority, we are of opinion that the rule contended for by the appellant should not be applied to a case like this, where the application is prepared by a general agent having no superior in the state." *Michigan Mut. Life Ins. Co. v. Leon*, 138 Ind. 636, 37 N. E. 584. A general agent of an insurance company may waive any stipulation in the policy, though a clause in the policy forbids it. *Gwaltney v. Society*, 132 N. C. 925, 44 S. E. 659. See, also, *German Fire Ins. Co. v. Gray*, 43 Kan. 497, 23 Pac. 637, 8 L. R. A. 70, 19 Am. St. Rep. 150. See, also, *German-American Ins. Co. v. Humphrey*, 62 Ark. 349, 35 S. W. 428, 54 Am. St. Rep. 297.

¹¹¹ *Phenix Ins. Co. v. Hart*, 149 Ill. 513, 36 N. E. 990; *Manufacturers' & Merchants' Ins. Co. v. Armstrong*, 145 Ill. 469, 34 N. E. 553. In *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 153, the court said of such a limitation: "The condition literally applied would prevent any undorsed consent by the company itself, by instruction of its board, or by act of its officers, as effectually as by any one else. And the case seems to settle down to the simple question whether a person who has agreed that he will only contract by writing in a certain way precludes himself from making a parol bargain to change it. The answer is manifest. A written bargain is of no higher legal degree than a parol one. Either may vary or discharge the other, and there can be no more force in an agreement in writing not to agree by parol than in a parol agreement not to agree in writing. Every such agreement is ended by the new one which contradicts it."

¹¹² *Manufacturers' & Merchants' Ins. Co. v. Armstrong et al.*, 145 Ill. 469, 34 N. E. 553, distinguishing *Baumgartel v. Insurance Co.*, 136 N. Y. 547, 32 N. E. 991; *Allen v. Insurance Co.*, 123 N. Y. 6, 25 N. E. 309; *Quinlan v. Insurance Co.*, 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645; *Messelback v. Norman*, 122 N. Y. 583, 26 N. E. 34.

which application of this rule is involved are those in which the policy contains a provision to the effect that no representative of the company shall have authority to waive any condition of the policy, except in writing indorsed thereon. It is clear that the effect of this limiting provision will be different in accordance as the alleged waiver, by the words or conduct of the agent, took place at the inception of the policy or afterwards. If the agent has full power to make the contract, certainly this limitation, set forth in a contract which he himself makes, cannot operate to restrict his power during the making of the contract.¹¹³ But the agent may have power to make a contract, and lack authority to rescind the contract when once made. So this condition, appearing in the regular form of a policy issued by the company, may well be considered as a proper restriction brought to the notice of the policy holder. This notice of a limitation upon the power of the agent, even though that agent may have general powers of making contracts, will preclude the insured from alleging that the agent possessed the powers of the principal for the purpose of changing the contract formerly made. Therefore it easily follows that the same agent may be considered as possessing the full powers of the principal with regard to the making of the contract, so that the limitation upon his powers to waive a condition will be inoperative, under the rule stated above, and yet have restricted powers as to any subsequent modification of the contract made.¹¹⁴ It is accordingly held, by the great weight of authority,¹¹⁵ that a subsequent waiver, even by an agent with contractual powers, will not be valid unless it complies with the requirements of the policy, except in those cases where

¹¹³ There is no reason why the general agent, having power to agree upon the terms of a contract made on behalf of his company, should not agree to leave out or waive the operation of this limiting condition. In *Gibson Electric Co. v. Liverpool & London & Globe Ins. Co.*, 159 N. Y. 418, 54 N. E. 23, the court said: "This court has several times held that the provisions in a standard policy, restricting the power of an agent to waive any of its conditions except in a particular manner, cannot be deemed to apply to the conditions which relate to the inception of the contract, where the agent delivered it and received the premium with a knowledge of the true situation. *WOOD v. INSURANCE CO.*, 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733."

¹¹⁴ *State Ins. Co. v. Hale* (Neb.) 95 N. W. 473; *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 20 N. E. 77, 11 Am. St. Rep. 121.

¹¹⁵ *Baumgartel v. Insurance Co.*, 136 N. Y. 547, 32 N. E. 990; *Allen v. Insurance Co.*, 123 N. Y. 6, 25 N. E. 309; *Quinlan v. Insurance Co.*, 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645; *MESSELBACK v. NORMAN*, 122 N. Y. 578, 26 N. E. 34, *Richards, Ins. Cas.* 397; *WALSH v. INSURANCE CO.*, 73 N. Y. 5, *Richards, Ins. Cas.* 480; *KNICKERBOCKER LIFE INS. CO. v. NOR-TON*, 96 U. S. 234, 24 L. Ed. 689, *Richards, Ins. Cas.* 399; *Carpenter v. Insurance Co.*, 16 Pet. 495, 10 L. Ed. 1044; *Hutchinson v. Insurance Co.*, 21 Mo. 103, 64 Am. Dec. 220; *Meyers v. Insurance Co.*, 27 La. Ann. 66; *Girard Fire & Marine Ins. Co. v. Hebard*, 95 Pa. 51. But see *Morrison v. Insurance Co.*, 69 Tex. 353, 6 S. W. 605, 5 Am. St. Rep. 63.

the insurer has himself expressly or impliedly dispensed with such compliance, or in fact conferred upon the agent contractual powers equal to his own.

Again it is held, almost without dissent, that a condition prohibiting a waiver of any term of the policy by any representative of the company, unless such a waiver is in writing, applies only to attempted waivers which precede a loss, but has no application to those which are subsequent to the loss.¹¹⁶ The condition of the policy most frequently waived after loss is that requiring proofs of loss within a certain time. It is held by practically all the authorities that this condition may be orally waived by an agent of the company, despite the presence of a condition requiring waivers to be in writing. The reason for this holding is found in the terms of a general rule stated above. With regard to such conditions as are to be fulfilled after a loss has taken place, the agent is usually a representative having the full powers of the principal—in effect, a vice principal—and the policy can no more do away with the legal significance of his acts as raising an estoppel against the principal than if they were done by the principal himself.

Same—Stipulation that Agent Taking Application is Agent of Insured.

It is quite natural that, when an applicant for insurance is informed that it is necessary that an application shall be filled out in accordance with the rules of the insurer, he should permit the representative of the company, with whom he is negotiating the insurance, to prepare the application for his signature. The questions are numerous, and the answers to be written, from consideration of space alone, must necessarily be general; and it is not unreasonable for the insured to look to the agent, supposed to be skilled in such matters, to fill out these blanks in such a manner as will be satisfactory to the company, from the information that is given him by the insured. It sometimes happens—whether through inadvertence, mistaken judgment, or fraud—that the agent, although receiving correct information from the insured, writes incorrect statements in the application. This gives rise to a dispute as to whether the agent, in filling out the application to be signed by the insured, is acting for the insured or for the insurer. By the overwhelming weight of authority in this country, the agent,

¹¹⁶ *Citizens' Ins. Co. v. Stoddard*, 197 Ill. 330, 64 N. E. 355; *Firemen's Fund Ins. Co. v. Western Refrigerating Co.*, 162 Ill. 322, 44 N. E. 746; *Wheaton v. Insurance Co.*, 76 Cal. 415, 18 Pac. 758, 9 Am. St. Rep. 216; *BLAKE v. INSURANCE CO.*, 12 Gray (Mass.) 265; *Franklin Fire Ins. Co. v. Chicago Ice Co.*, 36 Md. 102, 11 Am. Rep. 469; *New Orleans Ins. Ass'n v. Matthews*, 65 Miss. 301, 4 South. 62; *Travelers' Ins. Co. v. Harvey*, 82 Va. 949, 5 S. E. 553. But see *Smith v. Insurance Co.*, 60 Vt. 682, 15 Atl. 353, 1 L. R. A. 216, 6 Am. St. Rep. 144.

under such circumstances, is considered the agent of the insurer.¹¹⁷ The reason for this view is ably set forth in the oft-quoted opinion of Mr. Justice Miller in the leading case of *Union Mut. Ins. Co. v. Wilkinson*,¹¹⁸ as follows:

"This question has been decided differently by courts of the highest respectability in cases precisely analogous to the present. It is not to be denied that the application, logically considered, is the work of the assured; and, if left to himself, or to such assistance as he might select, the person so selected would be his agent, and he alone would be responsible. On the other hand, it is well known—so well that no court would be justified in shutting its eyes to it—that insurance companies organized under the laws of one state, and having in that state their principal business office, send these agents all over the land with directions to solicit and procure applications for policies; furnishing them with printed arguments in favor of the value and necessity of life insurance, and of the special advantages of the corporation which the agent represents. They pay these agents large commissions on the premiums thus obtained, and the policies are delivered at their hands to the assured. The agents are stimulated by letters and instructions to activity in procuring contracts, and the party who is in this manner induced to take out a policy rarely sees or knows anything about the company or its officers by whom it is issued, but looks to and relies upon the agent who has persuaded him to effect insurance as the full and complete representative of the company in all that is said or done in making the contract. Has he not a right to so regard him? It is quite true that the reports of judicial decisions are filled with the efforts of these companies, by their counsel, to establish the doctrine that they can do all this, and yet limit their responsibility for the acts of these agents to the simple receipt of the premium and delivery of the policy; the argument being that, as to all other acts of the agent, he is the agent of the assured. This proposition is not without sup-

¹¹⁷ *Continental Life Ins. Co. v. Pearce*, 39 Kan. 396, 18 Pac. 291, 7 Am. St. Rep. 557; *American Life Ins. Co. v. Mahone*, 21 Wall. (U. S.) 152, 22 L. Ed. 593; *UNION MUT. LIFE INS. CO. v. WILKINSON*, 13 Wall. (U. S.) 222, 20 L. Ed. 617; *Deitz v. Insurance Co.*, 31 W. Va. 851, 8 S. E. 616, 13 Am. St. Rep. 909; *Grattan v. Insurance Co.*, 80 N. Y. 281, 36 Am. Rep. 617; *Pickel v. Insurance Co.*, 119 Ind. 291, 21 N. E. 898; *Beebe v. Insurance Co.*, 25 Conn. 51, 65 Am. Dec. 553. An agent for the purpose of soliciting insurance, and sending applications to the insurer, is the agent of the insurer, and if any error is made by him the insured should not suffer. *STATE INS. CO. v. TAYLOR*, 14 Colo. 499, 24 Pac. 333, 20 Am. St. Rep. 281; *Baker v. Insurance Co.*, 70 Mich. 199, 38 N. W. 216, 14 Am. St. Rep. 485; *German Ins. Co. v. Gray*, 43 Kan. 497, 23 Pac. 637, 8 L. R. A. 70, 19 Am. St. Rep. 150; *German Fire Ins. Co. v. Hick*, 125 Ill. 361, 17 N. E. 792, 8 Am. St. Rep. 384; *Follette v. Association*, 110 N. C. 377, 14 S. E. 923, 15 L. R. A. 668, 28 Am. St. Rep. 697; *Hagan v. Insurance Co.*, 81 Iowa, 321, 46 N. W. 1114, 25 Am. St. Rep. 493.

¹¹⁸ 13 Wall. (U. S.) 222, 20 L. Ed. 617.

port in some of the earlier decisions on the subject; and at a time when insurance companies waited for parties to come to them to seek assurance, or to forward applications on their own motion, the doctrine had a reasonable foundation to rest upon. But to apply such a doctrine in its full force to the system of selling policies through agents, which we have described, would be a snare and a delusion, leading, as it has done in numerous instances, to the grossest frauds, of which the insurance corporations receive the benefits, and the parties supposing themselves insured are the victims. The tendency of the modern decisions in this country is steadily in the opposite direction. The powers of the agent are prima facie coextensive with the business entrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals.¹¹⁹ An insurance company establishing a local agency must be held responsible to the parties with whom they transact business for the acts and declarations of the agent, within the scope of his employment, as if they proceeded from the principal.¹²⁰

But the Supreme Court of Massachusetts,¹²¹ followed by that of Rhode Island,¹²² has persistently held that, in filling out the application, on its face purporting to be that of the insured, and which is signed by the insured, the agent is acting for the insured only.¹²³

¹¹⁹ Citing *Beebe v. Insurance Co.*, 25 Conn. 51, 65 Am. Dec. 553; *Lycoming County Mut. Ins. Co. v. Schollenberger*, 44 Pa. 259; *Beal v. Insurance Co.*, 16 Wis. 257, 82 Am. Dec. 719; *Davenport v. Insurance Co.*, 17 Iowa, 276.

¹²⁰ Citing *Woodbury Sav. Bank & Bldg. Ass'n v. Charter Oak Fire & Marine Insurance Co.*, 31 Conn. 517; *Horwitz v. Insurance Co.*, 40 Mo. 557, 93 Am. Dec. 321; *Ayres v. Insurance Co.*, 17 Iowa, 176, 85 Am. Dec. 553; *Howard Ins. Co. v. Bruner*, 23 Pa. 50.

¹²¹ See *Reed v. Insurance Co.*, 17 R. I. 785, 24 Atl. 833, 18 L. R. A. 496, citing *Batchelder v. Insurance Co.*, 135 Mass. 449, where it was held that parol evidence was inadmissible to show that the insurer knew of other insurance when he delivered the policy; also *Lohnes v. Insurance Co.*, 121 Mass. 439, where it was held that evidence that an agent "received applications for insurance, took risks, settled rates of premium, and issued policies" will not, unless he was proved to be the general agent of the company, sustain a finding that he had authority to waive the preliminary proof of loss required by the policy.

¹²² *Wilson v. Insurance Co.*, 4 R. I. 141; *Reed v. Insurance Co.*, 17 R. I. 785, 24 Atl. 833, 18 L. R. A. 496. The decision in the latter case was based upon the fact that the agent who effected the insurance was not a general agent, but merely a soliciting agent, and notice to him of prior insurance was not sufficient to constitute a waiver by the company of a condition prohibiting additional insurance. *O'Rourke v. Insurance Co.*, 23 R. I. 457, 50 Atl. 834, 57 L. R. A. 496, 91 Am. St. Rep. 643. See, also, *Leonard v. Assurance Co. (R. I.)*, 51 Atl. 1049, where it was held that the knowledge of a medical examiner that the applicant was contemplating other insurance was not binding on the company.

¹²³ In both Massachusetts and Rhode Island the above statement is held not to apply to representatives of the insurance company known as "general

Insurance companies then sought to escape the operation of the prevailing doctrine, by which they were made responsible for the fraud and mistakes of their agents while filling out applications, by inserting in the policy a provision that the person taking the application should be regarded as the agent of the insured, and not of the insurer. Much conflict arose among the decisions as to the validity of such a provision; some courts taking the view expressed by the Court of Appeals of New York in *Rohrbach v. Germania Fire Ins. Co.*:¹²⁴ "But we must take the contracts of the parties as we find them, and enforce them as they read. By the one before us the plaintiff has so fettered himself as to be unable to retain, as the case now stands, the real essence of his agreement. Though he has frankly and fully laid before the actor between him and the defendant all the facts and circumstances of the case, he is made responsible for error in legal conclusions which he never formed, and which were arrived at by one in whom he trusted, and whom he supposed to stand in the place of the defendant. * * * Held to the letter and substance of his contract, the plaintiff made a breach of a warranty and condition precedent, upon the truth of which his contract rested, and for that reason may not recover in this action, as the facts now stand." But many other courts took the view that "there is no magic of mere words to change the real into the unreal. A device of words cannot be imposed upon a court in place of an actuality of facts."¹²⁵ The reasons for this view are clearly expressed in the language of Mitchell, J., in the leading case of *Kausal v. Minnesota Farmers' Mut. Ins. Ass'n*:¹²⁶ "It would be a stretch of legal principles to hold that a person dealing with an agent apparently clothed with authority to act for his principal in the matter in hand could be affected by notice, given after the negotiations were completed, that the party with whom he had dealt should be deemed transformed from the agent of one party into the agent of the other. To be efficacious, such notice should be given before the negotiations are completed. The application precedes the policy, and the insured cannot be presumed to know that any such provision will be inserted in the latter. To hold that, by a stipulation unknown to the insured at the time he made the application, and when he relied upon the fact that the agent was acting for the company, he could be held responsible for the mistakes of such agent, would be to impose burdens upon the insured which he never anticipated. Hence

agents." *Reed v. Insurance Co.*, 17 R. I. 785, 24 Atl. 833, 18 L. R. A. 496; *Leonard v. Assurance Co. (R. I.)*, 51 Atl. 1049; *Lohnes v. Insurance Co.*, 121 Mass. 439.

¹²⁴ 62 N. Y. 47, 20 Am. Rep. 451, at page 462, per Folger, J.

¹²⁵ See *KAUSAL v. INSURANCE CO.*, 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776.

¹²⁶ 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776.

we think that, if the agent was the agent of the company in the matter of making out and receiving the application, he cannot be converted into the agent of the insured by merely calling him such in the policy subsequently issued."

The Mississippi court, however, in *Planters' Ins. Co. v. Myers*,¹²⁷ goes further, and states the ultimate reason why such an attempted limitation cannot be forced. "It is an effort," said the court, "by covenant to get the benefits and profits which these agents bring them, and at the same time repudiate the relation they sustain to them, and to set up that relationship with the assured, and that, too, without their knowledge and consent. It is not a limitation or restriction of power, but the dissolution of the relationship with themselves, and the establishment of it between other parties. * * * It converts the agent of one into the agent of both. He deals with the subject-matter for both contracting parties. He is instructed by the company to study his documents and papers, so that he can readily fill up the blanks. He can negotiate for the company for high rates of insurance, and at the same time his duty to his other principals is to cheapen the rates. It places the agent in an inconsistent and antagonistic position. On the other hand, he must ply the people to insure, extend, and increase the business and the profits of the company, and thereby put money in his own purse. But in doing all this, if he blunders and makes mistakes, for these he is the agent of his customers, and with them is the responsibility."

The tendency of the later decisions is strongly in favor of the latter view, and it may be said that, by the very great weight of authority, a stipulation in the policy making the insurer's agent the agent of the insured, as far as the application is concerned, is of no effect whatever, being contrary to the truth.¹²⁸

The next step taken by the insurers in their efforts to escape responsibility for the acts of their agents in connection with filling out the application was to avoid the objection made to the stipulation in the policy in the *Kausal Case*,¹²⁹ by placing a similar provision in the

¹²⁷ 55 Miss. 479, 30 Am. Rep. 521, page 527.

¹²⁸ *Coles v. Insurance Co.*, 41 W. Va. 261, 23 S. E. 732; *Deitz v. Insurance Co.*, 31 W. Va. 851, 8 S. E. 616, 13 Am. St. Rep. 909; *Pierce v. People*, 106 Ill. 11, 46 Am. Rep. 683; *Planters' Ins. Co. v. Myers*, 55 Miss. 479, 30 Am. Rep. 521; *KAUSAL v. INSURANCE CO.*, 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776; *Ellenberger v. Insurance Co.*, 89 Pa. 465; *Gans v. Insurance Co.*, 43 Wis. 108, 28 Am. Rep. 535; *Boetcher v. Insurance Co.*, 47 Iowa, 253. Though the general laws of a benefit society provide that the secretary of a local lodge shall be the agent of its members, still he is held to be the agent of the supreme order. *Supreme Lodge K. P. v. Withers*, 177 U. S. 260, 20 Sup. Ct. 611, 44 L. Ed. 762. See, also, *Commercial Ins. Co. v. Ives*, 56 Ill. 402.

¹²⁹ *KAUSAL v. INSURANCE CO.*, 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776.

application. Since there can be no question but that the insured has notice of a limitation contained in the application which he has signed, the act of the insurers in placing the stipulation that the person filling out the application shall be deemed the agent of the insured in the application has forced the courts to face squarely the question as to the validity of such a stipulation. In some states it has been upheld,¹³⁰ but the majority of the American courts have flatly decided that the stipulation, however fairly agreed upon, is in itself invalid, and therefore not enforceable.¹³¹ Thus the Kansas court has said, in a recent case¹³² involving the validity of a stipulation under such circumstances: "This is but a form of words to attempt to create on paper an agency which in fact never existed. It is an attempt of the company, not to restrict the powers of its own agent, but an effort to do away with that relation altogether by mere words, and to make him in the same manner the agent of the assured, when in fact such relation never existed. * * * We do not believe the entire nature and order of this well-established relation can be so completely subverted by this ingenious device of words. The real fact, as it existed, cannot be hidden in this manner; much less can it be destroyed, and something that did not in reality exist be placed in its stead. The substance is superior to the mere drapery of words with which one party wishes to bring into existence and clothe an unreal authority."

In some of the earlier New York cases,¹³³ it was held that this stipulation was enforceable. These decisions had been somewhat discredited, but later cases show that the doctrine in that state was greatly confused, until the recent important decision of *Sternaman v. Metropolitan Life Ins. Co.*,¹³⁴ in which it was held that the medical examiner was the agent of the insurer, despite a stipulation in the application that he should be deemed the agent of the insured. In so holding, the court said: "The power to contract is not unlimited. While, as a general rule, there is the utmost freedom of action in this regard, some restric-

¹³⁰ *Hubbard v. Association (O. C.)* 80 Fed. 681.

¹³¹ *Continental Ins. Co. v. Pearce*, 39 Kan. 396, 18 Pac. 291, 7 Am. St. Rep. 557; *Sternaman v. Insurance Co.*, 170 N. Y. 13, 62 N. E. 763, 57 L. R. A. 318, 88 Am. St. Rep. 625; *Endowment Rank K. P. v. Cogbill*, 99 Tenn. 28, 41 S. W. 340; *Massachusetts Ben. Life Ass'n v. Robinson*, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261. The medical examiner of a mutual benefit society is the agent of the society notwithstanding conditions to the contrary in the application. *Royal Neighbors of America v. Boman*, 177 Ill. 27, 52 N. E. 264, 69 Am. St. Rep. 201.

¹³² *Continental Ins. Co. v. Pearce*, 39 Kan. 396, 18 Pac. 291, 7 Am. St. Rep. 557.

¹³³ *ROHRBACH v. INSURANCE CO.*, 62 N. Y. 47, 20 Am. Rep. 451; *Alexander v. Insurance Co.*, 66 N. Y. 464, 23 Am. Rep. 76.

¹³⁴ 170 N. Y. 13, 62 N. E. 763, at page 764, 57 L. R. A. 318, 88 Am. St. Rep. 625.

tions are placed upon the right by legislation, by public policy, and by the nature of things. Parties cannot make a binding contract in violation of law or public policy. They cannot in the same instrument agree that a thing exists, and that it does not exist, or provide that one is the agent of the other, and at the same time, and with reference to the same subject, that there is no relation of agency between them. They cannot bind themselves by agreeing that a loan in fact void for usury is not usurious, or that a copartnership which actually exists between them does not exist. They cannot by agreement change the laws of nature or of logic, or create relations, physical, legal, or moral, which cannot be created. In other words, they cannot accomplish the impossible by contract."

Stipulation that the Insurer shall not be Charged with the Knowledge of His Agent.

As already indicated, the principal is chargeable with all knowledge acquired by the agent in the course of his employment, not because the agent has been authorized to acquire such information on behalf of his principal, but because of a positive rule of law, founded upon public policy. It is to be noted here that the rule that the knowledge of the agent is the knowledge of the principal is not subject to the same limitations with regard to these transactions in which the agent possessing information acts for the principal as are found to obtain in those instances where the information with which the principal is sought to be charged was acquired by some agent whose duty it was to communicate it. In this latter class of cases the principal will not be deemed to know what is known to his agent, (1) when the agent could not, by the exercise of due diligence, have communicated his information; or (2) where it was known to be contrary to the agent's personal interest to make such communications.¹³⁵ Thus, as we have also seen, the owner of a distant vessel, when insuring it, is required to communicate only such facts as the master of the vessel might have made known to him if he had faithfully performed his duties.¹³⁶ But where the knowledge of any material fact is possessed by the agent who is actually engaged in the transaction, such knowledge is absolutely imputable to the principal, whether it was possible for the agent to have made actual communication or not;¹³⁷ nor will this rule be changed

¹³⁵ See Tiff. Ag. p. 263. Also see BLACKBURN v. VIGORS, L. R., 12 App. Cas. 531, Richards, Ins. Cas. 330, Woodruff, Ins. Cas. 107, n. 1, Elliott, Ins. Cas. 141; PROUDFOOT v. MONTEFIORE, L. R. 2 Q. B. 511, Richards, Ins. Cas. 324, Woodruff, Ins. Cas. 106, Elliott, Ins. Cas. 152; American Surety Co. v. Pauly, 170 U. S. 144, 18 Sup. Ct. 552, 42 L. Ed. 977.

¹³⁶ See Gladstone v. King, 1 Maule & S. 35.

¹³⁷ Mesterman v. Insurance Co., 5 Wash. 524, 32 Pac. 458, 34 Am. St. Rep. 877; Burson v. Association, 136 Pa. 267, 20 Atl. 401, 20 Am. St. Rep. 919; Phoenix Ins. Co. v. Copeland, 90 Ala. 336, 8 South. 48; Goodwin v. Association,

by the fact that such an agent failed to communicate information obtained because of his own fraudulent purpose to defraud the principal, provided, of course, the third party with whom the agent is dealing is guilty of no bad faith.¹³⁸ The case most frequently found to involve the application of these principles in insurance law arises when the applicant for insurance gives to the agent of the insurer, who writes the answers to the questions in the application, correct information, which the agent, through mistake or fraud, incorrectly sets forth in the written answers. Under such circumstances, it is generally held that the insurer must be considered as knowing the facts thus correctly communicated to his agent, and therefore estopped to claim a forfeiture on account of the incorrectly written statement.¹³⁹

The principles above discussed being elementary and well established, it follows that any general limitation or agreement to the effect that the knowledge acquired by the agent shall not be imputed to the principal is but an attempt to contract away a rule of law, which is necessarily nugatory.¹⁴⁰ So far, the principle seems clear that the

97 Iowa, 226, 66 N. W. 157, 32 L. R. A. 473, 59 Am. St. Rep. 411; Forward v. Insurance Co., 142 N. Y. 382, 37 N. E. 615, 25 L. R. A. 637; Lynchburg Fire Ins. Co. v. West, 76 Va. 575, 44 Am. Rep. 177. See Tiff. Ag. p. 257-263.

¹³⁸ McArthur v. Association, 73 Iowa, 336, 35 N. W. 430, 5 Am. St. Rep. 684. Where untrue answers are written with the consent of the applicant, knowledge of the fraud attempted by the applicant cannot be imputed to the insurance company. Blooming Grove Mut. Fire Ins. Co. v. McAnerney, 102 Pa. 335, 48 Am. Rep. 209; Centennial Mut. Life Ass'n v. Parham, 80 Tex. 518, 16 S. W. 316.

But it was also held in a recent Texas case that where an agent continued to collect premiums from the insured, who had falsely stated the condition of his health, the agent's knowledge of the true condition of the insured's health was imputed to his principal, and prevented a forfeiture of the policy. Sun Life Ins. Co. of America v. Phillips (Tex. Civ. App.) 70 S. W. 608. But this decision seems contrary to authority and principle.

¹³⁹ Continental Life Ins. Co. v. Chamberlain, 132 U. S. 304, 10 Sup. Ct. 87, 33 L. Ed. 341; Union Mut. Life Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. Ed. 617; American Life Ins. Co. v. Mahone, 21 Wall. 152, 22 L. Ed. 593; Phoenix Ins. Co. v. Warttemberg, 79 Fed. 245, 24 C. C. A. 547; Klister v. Insurance Co., 128 Pa. 553, 18 Atl. 447, 5 L. R. A. 646, 15 Am. St. Rep. 696; Smith v. Insurance Co., 173 Pa. 15, 33 Atl. 567; Continental Life Ins. Co. v. Chew, 11 Ind. App. 330, 38 N. E. 417, 54 Am. St. Rep. 506; Bennett v. Insurance Co., 106 N. Y. 243, 12 N. E. 609; Farmers' Ins. Co. v. Williams, 39 Ohio St. 584, 48 Am. Rep. 474; McCall v. Insurance Co., 9 W. Va. 237, 27 Am. Rep. 558; Menk v. Insurance Co., 76 Cal. 50, 14 Pac. 837, 9 Am. St. Rep. 158; Bartholomew v. Insurance Co., 25 Iowa, 507, 96 Am. Dec. 65; German Ins. Co. v. Gray, 43 Kan. 48, 23 Pac. 637, 8 L. R. A. 70, 19 Am. St. Rep. 150.

¹⁴⁰ Parsons v. Insurance Co., 132 Mo. 590, 31 S. W. 117; Sternaman v. Insurance Co., 170 N. Y. 13, 62 N. E. 763, 57 L. R. A. 318, 88 Am. St. Rep. 625; Welch v. Association (Wis. 1904) 98 N. W. 227; Spalding v. Insurance Co., 71 N. H. 441, 52 Atl. 858. In some states the rule has been confirmed by statute. See section 1941, Rev. St. Wis. 1898; Welch v. Ass'n, supra.

principal cannot, by general limitation, wholly escape the operation of the rule of law that makes the agent's knowledge his own. The question next arises whether he may partially avoid the operation of that rule by providing that he shall not be bound by any information acquired by the agent, unless that information be communicated in a specified manner. The stipulation most frequently occurring is that no statements or representations made or information given to the persons soliciting or taking the application for the policy shall be binding on the company, or in any manner affect its rights, unless they are reduced to writing, and presented at the home office in the application. It is exceedingly difficult to determine whether such a limitation is valid, and the decisions are in great conflict, while the reasoning of the courts, whether on the one side or the other, is usually confused and obscure. The Supreme Court of the United States, in the important case of *New York Life Ins. Co. v. Fletcher*,¹⁴¹ which involved the same state of facts as that now under discussion, said: "Where such agents, not limited in their authority, undertake to prepare applications and take down answers, they will be deemed as acting for the companies. In such cases it may well be held that the description of the risk, though nominally proceeding from the assured, should be regarded as the act of the company. Nothing in these views has any bearing upon the present case. Here the power of the agent was limited, and notice of such limitation given by being embodied in the application, which the assured was required to make and sign, and which, as we have stated, he must be presumed to have read. He is therefore bound by its statements."

Although the Supreme Court appears to hold flatly in the *Fletcher* Case that a limitation of the kind now under discussion is valid and enforceable, yet it is well to observe that in the *Fletcher* Case the facts clearly showed that the applicant either had, or ought to have had, knowledge of the fraudulent purpose of the agents, and was therefore in no position to claim an estoppel as against the insurer, whom he must have intended to defraud.¹⁴² In some states the *Fletcher* Case has been approved, and the validity of such limitations sustained,¹⁴³ but it is believed that, by the great weight of authority among the American decisions, the contrary doctrine is established, to the effect that such an attempted limitation is obnoxious to the same principle that renders invalid an agreement that the agent of the insurer shall

¹⁴¹ *NEW YORK LIFE INS. CO. v. FLETCHER*, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934.

¹⁴² See *Koerts v. Grand Lodge (Wis.)* 97 N. W. 163. And see note 138, supra.

¹⁴³ *Metropolitan Life Ins. Co. v. Dimick* (N. J. Err. & App.) 55 Atl. 291, 62 L. R. A. 774; *Dwelling House Ins. Co. v. Snyder*, 59 N. J. Law, 18, 34 Atl. 931; *Maier v. Association*, 78 Fed. 566, 47 U. S. App. 322, 24 C. C. A. 239.

be considered the agent of the insured, for some purposes.¹⁴⁴ The Court of Appeals of New York, in the recent case of *Sternaman v. Metropolitan Life Ins. Co.*,¹⁴⁵ speaking of an agreement contained in the application that "no information or statement not contained in this application, and in the statements made to the medical ex-

¹⁴⁴ *Tubbs v. Insurance Co.*, 84 Mich. 646, 48 N. W. 296; *Royal Neighbors of America v. Boman*, 177 Ill. 27, 52 N. E. 264, 69 Am. St. Rep. 201; *Continental Ins. Co. v. Pearce*, 39 Kan. 396, 18 Pac. 291, 7 Am. St. Rep. 557; *Parno v. Insurance Co.*, 114 Iowa, 132, 86 N. W. 210; *Sternaman v. Insurance Co.*, 170 N. Y. 13, 62 N. E. 763, 57 L. R. A. 318, 88 Am. St. Rep. 625.

In *Marston v. Insurance Co.*, 89 Me. 266, 36 Atl. 389, 56 Am. St. Rep. 412, the application signed by the insured contained this certificate: "I have verified the foregoing answers and statements, and find them to be full, complete, and true. I do also adopt as my own, whether written by me or not, each foregoing statement, representation, and answer, and I agree that they are all material, and that statements made to an agent not herein written shall form no part of the contract to be issued hereon." A Maine statute (Rev. St. c. 49, § 90) provided that insurance companies should be bound by the knowledge of their agents in connection with the risk. It was held that evidence was admissible to show that an answer truly given by the insured was falsely written in the application by the agent, and the insurer thereby estopped to insist upon a forfeiture. The *Fletcher* Case was distinguished, however.

Mr. Freeman, commenting upon the decision made in *NEW YORK LIFE INS. CO. v. FLETCHER*, discussed above, in a note in 9 Am. St. Rep. 232, makes the following clear and convincing statement of the principle involved in that case: "That portion of the argument of the court which proceeds upon the assumption that as the insurer had no knowledge of the real answers or representations made by the assured, and had every reason to believe that it was contracting upon representations substantially different, the assured had no right to treat the contract as based on the unknown rather than on the known representations, at first seems entitled to very great force; but further consideration produces the conviction that, in contemplation of the law, the assumed facts do not and cannot exist. As a matter of fact, a principal may be ignorant of every act done, every representation made, and every fact known by his agent. But the law does not tolerate such ignorance, or, at least, does not permit the principal to interpose it to screen him from liability. What his agent said, did, and learned while engaged in the transaction of his business, he, the principal, must be regarded as saying, doing, and learning; and it would be a very unsound public policy which would permit a principal, in his delegation of authority to his agent, to stipulate against the usual consequences of agency, and particularly against the application to the agency in question of the well-known rule of law, that knowledge acquired by the agent while engaged in the discharge of a duty which the principal has confided to him must also be imputed to the principal. If an insurance corporation may stipulate that it shall be regarded as ignorant of every fact learned by its agent, but not communicated to it, so may any other principal; and if immunity may be secured from the operation of this principle of the law of agency, it may, in the same mode and with equal propriety, be secured against all other portions of the law of agency from which, in the contemplation of the principal, it may be profitable to be freed."

¹⁴⁵ 170 N. Y. 13, 62 N. E. 763, 57 L. R. A. 318, 88 Am. St. Rep. 625.

aminer, received or acquired at any time by any person, shall be binding upon the company, or shall modify or alter the declarations and warranties made therein," said: "The facts sought to be proved were contained in the oral statements made to the medical examiner, but, assuming that recorded statements only were meant, the result would be an agreement that the company might perpetrate a fraud upon the insured, by issuing a policy and accepting premiums thereon, knowing all the time that the contract was void or voidable at its election. The law does not permit this, for it declares that the company is estopped from taking advantage of such a contract, because it would be against equity and opposed to public policy."

While this decision declaring such a limitation contrary to public policy and void was rendered by a divided court—Parker, C. J., and two of the associate justices dissenting—yet it commends itself to reason, and seems supported by analogous cases. Thus the federal Supreme Court has held (1) that the agent taking the application represents the insurer in so doing;¹⁴⁶ (2) that a stipulation contained in the by-laws of a mutual benefit association to the effect that the person collecting premiums on behalf of the insurer should be deemed the agent of the insured in so doing was invalid, as contrary to fact;¹⁴⁷ and in the argument strongly approving those cases which hold invalid any agreement purporting to transform the agent of the insurer into the representative of the insured; (3) that, where a statute makes the person taking the application the agent of the insurer, the latter will be bound by an interpretation given to a question by the agent, in spite of an agreement contained in the application that no statement or representation made to the person soliciting the application should be binding on the insurer unless written in the application;¹⁴⁸—the court declaring flatly that such stipulation was void as being repugnant to the statute; and (4) that a failure of the insured to read his policy when delivered was not such negligence as to preclude his showing that, without his consent, an additional term had been inserted in the application, a copy of which application was attached to the policy.¹⁴⁹

It would seem that, if the insurer is prohibited by a rule of public policy from freeing himself by contract from all of the burdensome incidents consequent upon doing business through an agent, he ought

¹⁴⁶ *NEW YORK LIFE INS. CO. v. FLETCHER*, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934; *UNION MUT. LIFE INS. CO. v. WILKINSON*, 13 Wall. (U. S.) 222, 20 L. Ed. 617.

¹⁴⁷ *Supreme Lodge K. P. v. Withers*, 177 U. S. 260, 20 Sup. Ct. 611, 44 L. Ed. 762.

¹⁴⁸ *Continental Life Ins. Co. v. Chamberlain*, 132 U. S. 304, 10 Sup. Ct. 87, 33 L. Ed. 341.

¹⁴⁹ *McMaster v. Insurance Co.*, 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. 64.

to be equally prohibited from avoiding, wholly or in part, any of those incidents. Therefore we conclude, notwithstanding the great weight to which the decision in the Fletcher Case is entitled, that the usual stipulation that the insurer's agent shall be the agent of the insured, or that the insurer will not be bound by any knowledge acquired by his agent, or that he shall not be charged with information given to the agent unless it shall be communicated in writing, are all equally repugnant to settled principles of law, and therefore unenforceable.

Stipulation that the Insurer will not be Responsible for the Fraud of His Agent.

Closely related in principle to the attempted limitations just discussed, and usually contained in the same term of the policy or application, are those agreements whereby the insurer seeks to escape responsibility for the fraud perpetrated by the agent in the course of the transactions looking to the procurement of the policy. It is a fundamental principle that one shall not be allowed to exempt himself by contract from liability by reason of the fraud of his servants or agents.¹⁵⁰ It would seem, therefore, necessarily to follow that any agreement contained in the policy, by which the insurer is relieved from the consequences of his agent's fraud in making the contract of insurance, is necessarily without effect. It may be contended that the general doctrine of the principal's liability for the unauthorized fraud of his agent, when perpetrated in the course of his employment, should be confined to torts, and should not be relied upon to establish a contract to which the principal had never consented. In accordance with such a view, the insurer, declining to ratify the unauthorized fraudulent act of his agent, could, upon returning all premiums received, be discharged of all liability on the contract. But there are both practical and theoretical objections of too serious a nature to permit the courts to take this view of the rights of the parties. In the first place, the insurer never discovers the fraud of his agent until the contingency happens, upon which the policy becomes a claim for money to be paid, in which case he desires to repudiate the contract as unauthorized and return the premiums. In all other cases, however, even though fraud had been practiced by the agent, the premiums are always retained by the insurer, who has now no motive to discover his agent's fraud, while the insured is content with the payment as made in the serene, if mistaken, belief that he has had the protection of his insurance during the term agreed upon. Secondly, from the standpoint of theory, the insurer must be deemed to know all the means by which the insured

¹⁵⁰ *Sternaman v. Insurance Co.*, 170 N. Y. 13, 62 N. E. 763, 57 L. R. A. 318, 38 Am. St. Rep. 625; *Rathbone v. Railway Co.*, 140 N. Y. 48, 35 N. E. 418.

was induced by the agent to make the contract, and, by issuing the policy, and accepting the premiums paid, is estopped to deny that the acts and the representations of his agents were authorized. This being true as a principle of law, based upon a sound public policy, it cannot be changed by the agreement of the parties.¹⁵¹

¹⁵¹ See *Parno v. Insurance Co.*, 114 Iowa, 132, 86 N. W. 210, in which the court said: "If it [the stipulation in the application] was meant to cover such a case, it amounts to no more than a declaration by a party that he will not be liable for the fraud of his agent committed while acting within the scope of his authority, and such a declaration would be futile."

CHAPTER X.

WAIVER AND ESTOPPEL.

- 118-120. General Principles.
- 121. Parol Waivers.
- 122. Prior Parol Waivers.
- 123. Subsequent Parol Waivers.
- 124. Contemporaneous Parol Waivers.
- 125-126. What Constitutes a Waiver.
- 127-128. What may be Waived.

GENERAL PRINCIPLES.

- 118. **WAIVER** is the voluntary relinquishment of a known right. It may be express, or implied from circumstances, and it needs no consideration for its support.
- 119. **AN ESTOPPEL** exists when the insurer has brought about or allowed such conditions as make it inequitable for him to claim a right to which he would otherwise be entitled. A waiver is recognized to give effect to the intention of the party waiving, while an estoppel is enforced in order to defeat the fraudulent intention of the party estopped.
- 120. While thus distinguishable in theory, the doctrines of waiver and estoppel, as applied to insurance contracts, cannot be profitably treated separately, since the same circumstances that will raise an estoppel will usually also afford sufficient evidence of an implied waiver.

The terms "waiver" and "estoppel" are ordinarily used both by the courts and text-writers as synonymous, in the law of insurance. There is, however, a difference between the strict meanings of these two words, which sometimes becomes important,¹ especially with regard to rules of evidence. A waiver may be defined as the voluntary relinquishment

¹ Thus the language of the provision usually found in insurance policies, that no agent shall have authority to waive that condition requiring written consent to other subsequent insurance, or to waive any other subsequent condition, plainly refers to an intentional act. Such a "waiver" is not even similar to an estoppel. A limitation upon the agent's authority to waive such conditions is valid, and, if kept true, is enforceable. *Cleaver v. Insurance Co.*, 65 Mich. 527, 32 N. W. 660, 8 Am. St. Rep. 908. But if not true in fact, it is nugatory. *Knickerbocker Life Ins. Co. v. Norton*, 96 U. S. 234, 24 L. Ed. 689. A limitation upon the agent's authority to estop the insurer would be absurd. *Kyte v. Assurance Co.*, 144 Mass. 43, 10 N. E. 518, *Woodruff, Ins. Cas.* 477. See *Bennett v. Insurance Co.*, 203 Ill. 439, 67 N. E. 971, and *Welch v. Association (Wis.)* 98 N. W. 227, in which this distinction between waiver and estoppel is expressly recognized.

of a known right.² It is contractual in its nature, inasmuch as the insurer consents to relinquish the right or claim in question, and the insured assents to such relinquishment. A strict waiver, therefore, cannot exist unless so intended by the person waiving, while, as will presently be seen, a different rule applies to estoppel. A waiver may be expressly made by words, either written or oral, or it may be implied from the conduct of the insurer, when it is such as to indicate that he intends a waiver.

A Waiver Need not be Supported by a New Consideration.

A waiver depends for its validity, not necessarily upon a separate valuable consideration given to support it, but upon the doctrine of estoppel,³ and in many cases waivers have been enforced even when no circumstances of estoppel were present.⁴ An existing right may be relinquished by agreement, and such an agreement, if supported by val-

² See *Globe Mut. Life Ins. Co. v. Wolff*, 95 U. S. 326, 24 L. Ed. 387; *Ward v. Insurance Co.*, 66 Conn. 227, 33 Atl. 902, 50 Am. St. Rep. 80; *Hoxie v. Insurance Co.*, 32 Conn. 21, 85 Am. Dec. 240; *VIELE v. INSURANCE CO.*, 26 Iowa, 9, 96 Am. Dec. 83.

³ *Georgia Home Ins. Co. v. Kinnier's Adm'r*, 28 Grat. (Va.) 88; *VIELE v. GERMANIA INS. CO.*, 26 Iowa, 9, 96 Am. Dec. 83.

These cases state the law correctly. In some other jurisdictions, however, there has arisen some apparent conflict among the cases. Thus in *Ripley v. Insurance Co.*, 30 N. Y. 136, 86 Am. Dec. 362, Mullin, J., said: "It seems to me that a waiver, to be operative, must be supported by an agreement founded on a valuable consideration, or the act relied on as a waiver must be such as to stop a party from insisting on performance of the contract or forfeiture of the condition." See, also, to the same effect, *Underwood v. Insurance Co.*, 57 N. Y. 506, s. c. 48 How. Prac. (N. Y.) 372; *Marvin v. Insurance Co.*, 16 Hun (N. Y.) 496; *Lasher v. Insurance Co.*, 18 Hun (N. Y.) 104, s. c. 57 How. Prac. (N. Y.) 229; *McDermott v. Insurance Co.*, 44 N. Y. Super. Ct. 230. In the subsequent case of *Titus v. Insurance Co.*, 81 N. Y. 410, the court said: "It is now settled in this court, after some difference of opinion, that such a waiver need not be based upon any new agreement or an estoppel." See, to the same effect, *Roby v. Insurance Co.*, 120 N. Y. 510, 24 N. E. 808; *Pratt v. Insurance Co.*, 130 N. Y. 206, 29 N. E. 117. But in *Armstrong v. Insurance Co.*, 130 N. Y. 500, 29 N. E. 991, the court says of these decisions that, while "all hold that such waiver need not be based upon a technical estoppel, in all the cases where this question is presented, where there has been no express waiver, the fact is recognized that there exist the elements of an estoppel."

The statement of the law as made in *Ripley v. Insurance Co.*, supra, seems more correct than that of the subsequent cases criticising it, and is practically restored by *Armstrong v. Insurance Co.*, supra. It is difficult to see how a purely executory agreement to relinquish a right under a contract can be made enforceable, without the support of a consideration, by merely calling it a waiver. It would seem necessary that in every case the agreement to relinquish must be supported by a consideration or by an estoppel. See *Globe Mut. Life Ins. Co. v. Wolff*, 95 U. S. 326, 24 L. Ed. 387; *Eaton*, Eq. 172; and note 83, infra.

⁴ See preceding note, and cases cited in note 84, infra.

uable consideration, will be enforced, but rather as a contract than as a waiver. But when the parties to a contract have agreed that a certain right thereunder shall not be insisted upon, and one party is thereby induced so to change his condition as to make it inequitable for the other to claim the relinquished right, such an agreement will be enforceable, although without a new and separate consideration. From another point of view it may be said that where the insured has, in reliance upon a waiver, prejudicially changed his condition, that fact will of itself constitute a sufficient consideration to support the agreement of waiver.⁵

Estoppel.

Estoppel is an equitable doctrine, enforced for the purpose of preventing one party from taking an unfair advantage of another who has reasonably relied upon his words or conduct.⁶ When the insurer has acted in such a way as to give the insured reason to believe that some known right under the policy would not be insisted upon, and the insured has acted upon that belief, the insurer will be estopped to give the lie to his conduct, and claim that right to the prejudice of the insured.⁷ An estoppel is thus seen to differ from a waiver very much as a so-called quasi contract differs from a true contract. An estoppel is enforced by the courts for the purpose of preventing the insurer from defrauding the insured, and in opposition to his intention, while a waiver is enforced for the purpose of carrying out the intention of the insurer. It is apparent, however, that ordinarily the same circumstances which will raise an implied waiver will also be sufficient to constitute an estoppel; the terms used differing with the point of view. Thus, when the insurer accepts a premium which is overdue, his act may be regarded either as indicating an intention to waive his right to declare the policy forfeited for nonpayment of premium, or as estopping him to set up the forfeiture, which the insured reasonably supposed that he would not insist upon. The close relationship of the doctrine of waiver to the equitable doctrine of estoppel is thus expressed by Mr. Justice Field in the important case of *Globe Mut. Life Ins. Co. v. Wolff*:⁸ "The doctrine of waiver, as asserted against insurance companies to avoid the strict enforcement

⁵ See *Dilleber v. Insurance Co.*, 76 N. Y. 567.

⁶ See *Eaton*, Eq. p. 165.

⁷ As said by Miller, J., in *UNION MUT. LIFE INS. CO. v. WILKINSON*, 13 Wall. 222, 20 L. Ed. 617: "The principle is that where one party has, by his representation or his conduct, induced the other party to a transaction to give him an advantage which it would be against equity and good conscience to assert, he would not, in a court of justice, be permitted to avail himself of that advantage." Approved in *Manhattan Fire Ins. Co. v. Weill*, 28 Grat. (Va.) 389, 26 Am. Rep. 364.

⁸ 95 U. S. 326, 24 L. Ed. 387.

of conditions contained in their policies, is only another name for the doctrine of estoppel. It can only be invoked where the conduct of the companies has been such as to induce action in reliance upon it, and where it would operate as a fraud upon the assured if they were afterwards allowed to disavow their conduct and enforce the conditions."⁹

PAROL WAIVERS.

121. There is much conflict among the courts as to when the rules of evidence will permit a parol waiver of a term of a written contract to be shown. This conflict may, to some extent, be obviated, and the resulting confusion as to principles applicable cleared away, by dividing all cases involving parol waivers into three classes, as follows:

- (a) Those involving prior parol waivers of subsequently written terms.
- (b) Those involving subsequent parol waivers of previously written terms.)
- (c) Those in which the acts sought to be shown by parol occurred contemporaneously with the final execution of the written contract.

Perhaps no branch of the law presents more hopeless confusion and conflict among the cases than is to be found among those involving questions of waiver and estoppel in insurance law. This conflict centers about three inherently difficult questions usually involved in the consideration of the validity of a waiver of a right claimed in accordance with the terms of an insurance contract. These concern (1) the power of the agent concerned to make the alleged waiver; (2) the admissibility of parol evidence to show a waiver of a term of writ-

⁹ In *Kiernan v. Insurance Co.*, 150 N. Y. 190, 44 N. E. 698, these terms are thus distinguished: "The distinction between waiver and estoppel, as applied to the law of insurance, is not in all respects clearly defined. An express waiver is in the nature of a new contract, modifying to some extent the old one. It does not require a new consideration, unless it is by inducing a change of position, for the law of waiver seems to be a 'technical doctrine introduced and applied by courts for the purpose of defeating forfeitures.' *People v. Manhattan Co.*, 9 Wend. 351, 381; *Knickerbocker Life Ins. Co. v. Norton*, 96 U. S. 234, 24 L. Ed. 689. An estoppel forbids the assertion of the truth by one who has knowingly induced another to believe what is untrue and to act accordingly. While express waiver rests upon intention, and estoppel upon misleading conduct, implied waiver may rest upon either; for it exists when there is an intention to waive, unexpressed, but clearly to be inferred from circumstances, or when there is no such intention in fact, but the conduct of the insurer has misled the insured into acting on a reasonable belief that the company has waived some provision of the policy. *Ronald v. Association*, 132 N. Y. 378, 30 N. E. 739; *Armstrong v. Insurance Co.*, supra; 2 *Biddle, Ins.* § 1052."

ten contract; and (3) the elements necessary to constitute a waiver, or estoppel in pais.

Much of this conflict is due to irreconcilable differences in the points of view taken by the courts in different jurisdictions, while perhaps more is due to misconception of the fundamental principles involved, and to a blind and indiscriminating following of precedents, which themselves are often ill-considered. An attempt has already been made in the preceding chapter to establish some principles of universal and necessary application with regard to the powers of agents representing insurance companies, and these principles, in the following discussion, will be strictly applied in the effort to clear away, as far as possible, the confusion in which the doctrine of waiver and estoppel in insurance law has enveloped itself. It is now proposed to state some general principles applicable to the second subject above mentioned—that is, the admissibility of parol evidence to show a waiver of a written condition—which, it is hoped, may render less difficult an understanding of the law of this subject, and make possible the partial harmonizing of the cases.

The objection to proving a waiver of such a written condition by parol testimony grows out of the well-known parol evidence rule, thus stated by Mr. Greenleaf:¹⁰ "Parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument." It is plain that the effect of proving a waiver is, in one sense, to alter and sometimes to contradict the terms of a written instrument; and, therefore, as will presently be seen, some courts have declined to allow parol evidence to be admitted in proof of such a waiver. There are, however, many cases of parol waiver that do not in any wise involve the parol evidence rule, and therefore do not afford proper ground for conflict in opinion. In order to distinguish clearly those cases which apparently involve the parol evidence rule from those which clearly do not, parol waivers may be properly divided into three classes, as follows:

- (a) Those parol agreements, whether expressed or implied, which precede the execution of the written contract, and by the terms of which it is provided, in effect, that some condition of the subsequently issued policy shall be inoperative, will be called "prior parol waivers."
- (b) Those parol agreements that are made subsequently to the execution of the policy, by which the parties seek to modify or abrogate some condition of that policy, will be known as subsequent parol waivers.
- (c) When the acts of the insurer that are sought to be proved by parol as estopping him to enforce some condition or right given by the terms of the contract, took place simultaneously with the final ex-

¹⁰ 1 *Greenl. Ev.* (16th Ed.) § 275.

ecution or delivery of the policy, such an estoppel will be termed a "contemporaneous parol waiver." These three classes of parol waivers will now be discussed, and the principles properly applicable stated and applied to the cases.

PRIOR PAROL WAIVERS.

122. In no case can parol evidence be admitted to show a waiver, express or implied, of any term of a subsequently issued policy. To admit such evidence would unquestionably be to alter by parol the terms of a valid written instrument.

The rule that all prior parol agreements are merged in a subsequent written contract touching the same subject-matter is now too well established to need the support of cited authority. Therefore, when a policy of insurance, properly executed, is offered by the insurer and accepted by the insured as the evidence of their contract, it must be conclusively presumed to contain all the terms of the agreement for insurance by which the parties intend to be bound. If any previous agreement of the parties shall be omitted from the policy, or any term not theretofore considered added to it, the parties are necessarily presumed to have adopted the contract as written as the final form of their binding agreement. "The entire engagement of the parties, with all the conditions upon which its fulfillment could be claimed, must be conclusively presumed to be there stated. If, by inadvertence or mistake, provisions other than those intended were inserted, or stipulated provisions were omitted, the parties could have had recourse for a correction of the agreement to a court of equity, which is competent to give all needful relief in such cases. But until thus corrected, the policy must be taken as expressing the final understanding of the assured and of the insurance company."¹¹ It is true, as has been heretofore explained,¹² that there is a tendency on the part of some courts, in effect, to enforce the equitable remedy of reformation in actions at law upon insurance contracts, when the equitable position of the insured is unusually strong, as when the Supreme Court of the United States held in *McMaster v. New York Life Ins. Co.*,¹³ that the insured, by accepting a policy, was not conclusively bound by a stipulation inserted therein without his knowledge or consent. But with the exception of such cases, in which the insurer is clearly estopped to insist upon this rule of law, it must be universally held that a writing, accepted as a

¹¹ Field J., in *UNION MUT. LIFE INS. CO. v. MOWRY*, 96 U. S. 544, 24 L. Ed. 674; *Richards, Ins. Cas.* 381.

¹² See *supra*, p. 299.

¹³ 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. 64.

contract, contains all the terms to which the parties have given their consent, and no others.

As a necessary consequence of the operation of this rule, it follows that any agreement which may have been made between the insured and the insurer prior to the issue of the policy can have absolutely no effect upon the rights of the parties, unless it is contained in the written policy. Therefore any evidence offered to show a prior parol agreement, in order to vary in any wise the rights of the parties to a subsequent written agreement, is necessarily inadmissible. This, being true of general agreements, is also true of a waiver,¹⁴ which, as we have seen, is contractual in its nature. This rule equally forbids the proof by parol of conduct alleged to constitute an estoppel, if such conduct in fact preceded the issue of the policy. This rule is well illustrated by the leading case of *Union Mut. Life Ins. Co. v. Mowry*,¹⁵ in which the insurance agent, in his efforts to induce the assured to take insurance, promised that he should have notice when each premium should become due, and that he need give himself no uneasiness on that subject. Relying on this promise to give notice, which was not contained in the subsequently issued policy, the assured failed to pay the premium when it became due; and the company, under a provision of the policy, declared the policy forfeited, although no notice had been given. The lower court admitted evidence of this parol agreement, made by the agent, to give notice, as establishing an estoppel against the company to claim a forfeiture under the terms of the policy for nonpayment of the premium at its maturity. But the Supreme Court held the evidence inadmissible, and that no such prior parol agreement could be shown to contradict the terms of the policy. "The only case," said the court, "in which a representation as to the future can be held to operate as an estoppel, is where it relates to an intended abandonment of an existing right, and is made to influence others, and by which they have been induced to act. An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made. The doctrine of estoppel is applied with respect to representations of a party, to prevent their operating as a fraud upon one who has been led to rely upon them. They would have that effect, if a party who, by his statements, as to matters of fact, or as to his intended abandonment of existing rights, had designedly induced another to change his conduct or alter his condition in reliance upon them, could be permitted to deny the truth of his statements, or enforce his rights against his declared intention of abandonment. But the doctrine has no place

¹⁴ *Wells v. Insurance Co.*, 28 Ind. App. 620, 62 N. E. 501, 88 Am. St. Rep. 208.

¹⁵ 96 U. S. 544, 24 L. Ed. 674; *Richards, Ins. Cas.* 381.

for application when the statement relates to rights depending upon contracts yet to be made, to which the person complaining is to be a party. He has it in his power in such cases to guard in advance against any consequences of a subsequent change of intention and conduct by the person with whom he is dealing. For compliance with arrangements respecting future transactions, parties must provide by stipulations in their agreements when reduced to writing. The doctrine, carried to the extent for which the assured contends in this case, would subvert the salutary rule that the written contract must prevail over previous verbal arrangements, and open the door to all the evils which that rule was intended to prevent."¹⁶

The principles upon which rests the doctrine that prior parol waivers cannot be shown, as thus set forth by the Supreme Court, are so clear, and so little obscured by the shadows cast by closely related principles, that there would seem to be no excuse for any conflict of authority with reference to their application, although unfortunately many conflicting cases are to be found in our reports. Where cases are found in which evidence of prior parol waivers has been admitted, the error of the court will usually be found to be due to a failure to distinguish prior parol waivers from subsequent parol waivers, which, as will presently be seen, are radically different in nature. Thus, in the recent case of *Continental Ins. Co. of New York v. Browning*,¹⁷ the court held admissible evidence to show an agreement made between the insured and the insurance agent, prior to the execution of the policy, to the effect that the insured "need not worry about meeting the payments promptly, and that the company would see that his policy was kept alive, even if his payments were behind a few days." This agreement did not appear in the policy, which, instead, contained a provision that a failure to pay any installment of the premium when due would relieve the company of liability during the time in which such installment remained due and unpaid. There was also other evidence tending to show that after the issue of the policy the company gave the insured reason to suppose that prompt payment of the premium installments as required by the policy would not be insisted upon. From the principle stated above, it is clear that the previous

¹⁶ To the same effect, see *Thompson v. Insurance Co.*, 104 U. S. 252, 259, 26 L. Ed. 765; *Gray v. Insurance Co.*, 155 N. Y. 180, 49 N. E. 675; *Moore v. Insurance Co.*, 141 N. Y. 219, 36 N. E. 191; *National Mut. Ben. Ass'n v. Hickman*, 86 Ky. 256, 5 S. W. 565; *Fitchburg Sav. Bank v. Amazon Ins. Co.*, 125 Mass. 431; *Germania Ins. Co. v. Bromwell*, 62 Ark. 45, 34 S. W. 83; *Mobile Life Ins. Co. v. Pruett*, 74 Ala. 497; *Union Cent. Life Ins. Co. v. Chowning*, 8 Tex. Civ. App. 459, 28 S. W. 117; *Wells v. Insurance Co.*, 28 Ind. App. 620, 62 N. E. 501, 88 Am. St. Rep. 208.

¹⁷ (Ky. 1902) 70 S. W. 660, 24 Ky. Law Rep. 992. See, also, *State Mut. Ins. Co. v. Latourette* (Ark.) 74 S. W. 300.

agreement was wholly inadmissible, but that the evidence of the subsequent conduct of the insurer was proper.

SUBSEQUENT PAROL WAIVERS.

123. A written contract may be altered or abrogated at will by the subsequent parol agreement of the parties. Hence any conduct or acts of the insurer subsequent to the execution of the policy may be freely shown by parol in order to prove a waiver of any term thereof. The terms most frequently thus shown to have been waived are:

- (a) The requirement of prompt payment of premiums by customarily receiving overdue premiums.
- (b) Limitations upon the authority of inferior agents by permitting the exercise of the powers denied.
- (c) The condition of forfeiture for nonpayment of premiums by accepting an overdue premium or otherwise indicating that the policy is regarded as still in force.
- (d) Conditions requiring proofs of loss, submission to arbitration, or other acts subsequent to the completion of the contract, by absolutely denying liability, or otherwise showing that the performance of such acts is not desired or expected.

There is no principle of right or reason, or any rule of authority, which can prevent the parties to a written agreement from altering that agreement in any way they may desire, or abandoning it altogether, by mere parol agreement. Under modern decisions it is even held that a contract under seal may be altered by the mutual parol agreement of the parties, the consent of each party to such modification calling for the similar consent of the other.¹⁸ Hence we conclude, without difficulty, that, however formally a policy may have been executed in writing, the parties thereto can subsequently, at their pleasure, vary that contract in any respect they may desire, and such an agreement will not in any wise involve the parol evidence rule, since it plainly does not come within its terms. This agreement can be made formally or informally, and may be as well implied from the conduct of the parties as it may be expressed by their words. Therefore parol evidence is always admissible to show a waiver, express or implied, of any of the terms of a previously written contract of insurance.¹⁹ So the conduct of the insurer, or of a competent agent, subsequent to the issue of the policy, may be freely shown to establish an estoppel against the insurer claiming a right under the strict letter of the contract. Another leading case decided by the Supreme Court

¹⁸ *McCreery v. Day*, 119 N. Y. 1, 23 N. E. 193, 6 L. R. A. 503, 16 Am. St. Rep. 793. See, also, *Clark*, *Cont.* (2d Ed.) p. 418. But in Canada it seems that a parol waiver of a condition of a sealed policy cannot be shown. See *Scott v. Insurance Co.*, 25 U. C. Q. B. 119.

¹⁹ *New York Life Ins. Co. v. Eggleston*, 96 U. S. 527, 24 L. Ed. 841; *VIELE*

of the United States only a week later than the Mowry Case, just discussed (*Knickerbocker Life Ins. Co. v. Norton*²⁰), well illustrates the rule that subsequent parol waivers are admissible. In that case the policy contained a provision that "agents of the company are not authorized to make, alter or abrogate contracts or waive forfeitures." The policy also provided that a failure to pay any premium or note at maturity should render the policy null and void. The evidence showed that the company did in fact allow its agents to extend the time for the payment of premium notes, despite the restriction mentioned in the policy. The insured, after the maturity of a premium note, secured an extension of time from the agent, and died before the expiration of the extended time. It was contended by the counsel for the company that the admission of parol testimony of a waiver of the condition of prompt payment of premium notes at maturity was to vary the terms of the written instrument, but the Supreme Court, in holding the evidence admissible and competent, said:

"The written agreement of the parties, as embodied in the policy and the indorsement thereon, as well as in the notes and the receipt given therefor, was undoubtedly to the express purport that a failure to pay the notes at maturity would incur a forfeiture of the policy. It also contained an express declaration that the agents of the company were not authorized to make, alter, or abrogate contracts or waive forfeitures. And these terms, had the company so chosen, it could have insisted on.²¹ But a party always has the option to waive a condition or stipulation made in his own favor. The company was not bound to insist upon a forfeiture, though incurred, but might waive it. It was not bound to act upon the declaration that its agents had no power to make agreements or waive forfeitures, but might at any time, at its option, give them such power. The declaration was only tantamount to a notice to the assured, which the company could waive and disregard at pleasure. In either case, both with regard to the

v. INSURANCE CO., 26 Iowa, 9, 96 Am. Dec. 83; *German-American Ins. Co. v. Humphrey*, 62 Ark. 348, 35 S. W. 428, 54 Am. St. Rep. 297; *Western Assur. Co. v. Williams*, 94 Ga. 128, 21 S. E. 370; *Burlington Ins. Co. v. Rivers*, 9 Tex. Civ. App. 177, 28 S. W. 453; *Manufacturers' & Merchants' Ins. Co. v. Armstrong*, 145 Ill. 469, 34 N. E. 553; *Grubbs v. North Carolina Home Ins. Co.*, 108 N. C. 472, 13 S. E. 236, 23 Am. St. Rep. 62; *Kenyon v. Association*, 122 N. Y. 247, 25 N. E. 299; *McFarland v. Insurance Co.*, 134 Pa. 590, 19 Atl. 796, 19 Am. St. Rep. 723; *Phenix Ins. Co. v. Bowdre*, 67 Miss. 620, 7 South. 596, 19 Am. St. Rep. 326; *Burson v. Association*, 136 Pa. 267, 20 Atl. 401, 20 Am. St. Rep. 919; *German Ins. Co. v. Gray*, 43 Kan. 497, 23 Pac. 637, 8 L. R. A. 70, 19 Am. St. Rep. 150; *Orient Ins. Co. v. McKnight*, 197 Ill. 190, 64 N. E. 339.

²⁰ 96 U. S. 234, 24 L. Ed. 689; *Richards, Ins. Cas.* 399; *Elliott Ins. Cas.* 52.

²¹ *Carey v. Insurance Co.*, 84 Wis. 80, 54 N. W. 18, 20 L. R. A. 267, 36 Am. St. Rep. 907.

forfeiture and to the powers of its agent, a waiver of the stipulation or notice would not be repugnant to the written agreement, because it would only be the exercise of an option which the agreement left in it. And whether it did exercise such option or not was a fact provable by parol evidence, as well as by writing, for the obvious reason that it could be done without writing."²²

Instances of Subsequent Parol Waivers.

The reports are full of illustrations of parol subsequent waivers of conditions in insurance contracts concerning the proof of which, by parol testimony, there should be no room for dispute. The principle applicable to all such waivers is the same, but it will be profitable to set forth some specific instances further illustrating the principle referred to.

Probably the most frequently occurring waiver by subsequent act is the receipt of an overdue premium, by which act the insurer estops himself from claiming that the policy was forfeited by nonpayment of such premium at its maturity.²³ So in many jurisdictions it is held that the insurer, by customarily receiving premiums when overdue, waives that condition of the contract requiring prompt payment, so that the insured may demand that the premium shall be received in accordance with that custom within a reasonable time after its maturity.²⁴ As heretofore stated, however, it is doubtful whether this view is correct, not because there is any question as to the admissibility

²² To the same effect, see *New York Life Ins. Co. v. Eggleston*, 96 U. S. 572, 24 L. Ed. 841; *Phenix Mut. Life Ins. Co. v. Doster*, 106 U. S. 30, 34, 1 Sup. Ct. 18, 27 L. Ed. 65, 67; *Hartford Life & Annuity Ins. Co. v. Unsell*, 144 U. S. 439, 12 Sup. Ct. 671, 36 L. Ed. 496.

²³ *Phenix Mut. Life Ins. Co. v. Doster*, 106 U. S. 34, 1 Sup. Ct. 22, 37 L. Ed. 67; *Mutual Ben. Life Ins. Co. v. Robertson*, 59 Ill. 123, 14 Am. Rep. 8; *Mutual Life Ins. Co. v. French*, 30 Ohio St. 240, 27 Am. Rep. 443; *Walsh v. Insurance Co.*, 30 Iowa, 133, 6 Am. Rep. 664; *Sweetser v. Association*, 117 Ind. 97, 19 N. E. 722.

²⁴ *Newark Mach. Co. v. Kenton Ins. Co.*, 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768; *Stewart v. Insurance Co.*, 155 N. Y. 257, 49 N. E. 876, 42 L. R. A. 147; *Bodine v. Insurance Co.*, 51 N. Y. 117, 10 Am. Rep. 566; *Dilleber v. Insurance Co.*, 76 N. Y. 567; *Knickerbocker Life Ins. Co. v. Norton*, 96 U. S. 234, 24 L. Ed. 689; *De Frece v. Insurance Co.*, 136 N. Y. 144, 32 N. E. 557; *HOME PROTECTION OF NORTH ALABAMA v. AVERY*, 85 Ala. 348, 5 South. 143, 7 Am. St. Rep. 54; *Northwestern Mut. Life Ins. Co. v. Uerman*, 119 Ill. 329, 10 N. E. 225; *Sweetser v. Association*, 117 Ind. 97, 19 N. E. 722; *Continental Ins. Co. v. Browning*, 70 S. W. 660, 24 Ky. Law Rep. 992. The acceptance of premiums waives previous right of setting up a forfeiture on technical grounds. *Supreme Lodge K. P. v. Kalluski*, 163 U. S. 289, 16 Sup. Ct. 1047, 41 L. Ed. 163; *Appleton v. Insurance Co.*, 59 N. H. 541, 47 Am. Rep. 220; *McCorkle v. Association*, 71 Tex. 149, 8 S. W. 516; *Unsell v. Insurance Co. (C. C.)* 32 Fed. 443.

of the evidence, but because it is doubtful whether all the elements of a waiver are present.²⁵

Another class of subsequent waivers frequently occurring includes those cases in which conditions in the policy placing restrictions upon the authority of subordinate agents are shown to be waived by evidence that the company has actually allowed the agent to exercise the powers that have been expressly denied by the condition in question. The Norton Case,²⁶ discussed above, is typical of this class. So the condition requiring proofs of loss,²⁷ or appraisalment,²⁸ or that questions in dispute shall be submitted to arbitration,²⁹ or requiring that any other acts shall be done as conditions precedent to the right to claim performance by the insurer, can be shown to have been waived by him by such acts of himself or his agent as clearly show that the performance of those conditions is not expected or required.

²⁵ KNICKERBOCKER LIFE INS. CO. v. NORTON, 96 U. S. 234, 24 L. Ed. 689, Richards, Ins. Cas. 399, Elliott, Ins. Cas. 52.

²⁶ KNICKERBOCKER LIFE INS. CO. v. NORTON, *supra*.

²⁷ If the insured in good faith does what he plainly intends as a compliance with the requirements of his policy in regard to proofs of loss, the failure of the insurance company to notify him of any objections to the proofs furnished constitutes a waiver of any further proof. *Moyer v. Insurance Office*, 176 Pa. 579, 35 Atl. 221, 53 Am. St. Rep. 690.

Where the insurance company receives and returns proofs of loss without making any objections thereto, it will be deemed to have waived any defects therein. *Vangindertallen v. Insurance Co.*, 82 Wis. 112, 51 N. W. 1122, 33 Am. St. Rep. 29; *Welsh v. Assurance Corp.*, 151 Pa. 607, 25 Atl. 142, 31 Am. St. Rep. 786; *Insurance Co. of North America v. McDowell*, 50 Ill. 120, 99 Am. Dec. 497; *McBryde v. Insurance Co.*, 55 S. C. 589, 33 S. E. 729, 74 Am. St. Rep. 769. If the insurer denies his liability for a loss, he thereby waives any defects in the proofs submitted to him. *ANGIER v. ASSURANCE CO.*, 10 S. D. 82, 71 N. W. 761, 66 Am. St. Rep. 685; *German-American Ins. Co. v. Norris*, 100 Ky. 29, 37 S. W. 267, 66 Am. St. Rep. 324; *Insurance Co. v. Nonnent*, 91 Tenn. 1, 18 S. W. 395; *German Ins. Co. v. Gray*, 43 Kan. 497, 23 Pac. 637, 8 L. R. A. 70, 19 Am. St. Rep. 150. The required proof of loss within sixty days is waived by the insurer by denying his liability on other grounds till after the lapse of the given period. *Germania Fire Ins. Co. v. Pitcher*, 160 Ind. 392, 64 N. E. 921.

After the adjuster of an insurance company had visited the premises and examined the loss, it was held no defense that preliminary proofs of loss were not furnished to the company as required by the policy. *McClelland v. Insurance Co.*, 107 La. 124, 31 South. 691.

²⁸ See *Bangor Sav. Bank v. Niagara Fire Ins. Co.*, 85 Me. 68, 26 Atl. 991, 20 L. R. A. 650, 35 Am. St. Rep. 341.

²⁹ *Farnum v. Insurance Co.*, 83 Cal. 246, 23 Pac. 869, 17 Am. St. Rep. 233. When an insurance policy makes arbitration of loss a condition precedent to suit, and the insured demands arbitration, which is refused by the insurer, such refusal constitutes a waiver of the arbitration condition. *Continental Ins. Co. v. Wilson*, 45 Kan. 250, 25 Pac. 629, 23 Am. St. Rep. 720; *Nurney v. Insurance Co.*, 63 Mich. 633, 30 N. W. 350, 6 Am. St. Rep. 338. The right to arbitrate is waived by a failure to respond to a letter of the insured demand-

CONTEMPORANEOUS PAROL WAIVERS.

124. Evidence of circumstances attending the delivery of the policy may be offered as showing a waiver or estoppel as to some condition of the policy under two different, though apparently similar, states of fact.

- (a) Such evidence may be offered by the insured to show a waiver of a future or executory condition, in the nature of a condition subsequent. By the weight of authority, parol evidence is not admissible for such a purpose.
- (b) Or the insured may desire to prove by parol that the circumstances under which the contract was made were such as make it inequitable for the insurer to claim benefit from the breach of a condition which would prevent the valid inception of the contract, being in the nature of a condition precedent. By the great weight of authority, parol evidence is admissible, not for the purpose of altering a term of the written contract, but to estop the insurer from deriving an unfair advantage from such term.

Assuming it to be settled on unquestionable principle that prior waivers of conditions of subsequently written contracts cannot be proved by parol, and that subsequent waivers of the conditions of a previously written contract may always be so shown, we have next to consider the difficult and confusing question as to the admissibility of parol evidence to prove what has been heretofore denominated a contemporaneous waiver or estoppel. It is upon this subject that the greatest confusion and the fiercest conflict are to be found among the authorities. For purposes of clearness, we must note here an important distinction that exists between a contemporaneous waiver, strictly so called, and a proper estoppel contemporaneous with the delivery of the policy: (1) At the time of delivering a policy that contains a condition avoiding it if the building insured shall remain unoccupied for a specified time, the general agent of the insurer expressly waives the benefit of that condition, and the insured accepts the policy with the understanding that that condition shall not be operative. This is a waiver proper, but it is apparent that on sound principle such a waiver, although contemporaneous with the delivery of the policy, and inducing its acceptance, cannot be shown by parol without a clear violation of the parol evidence rule. Therefore we conclude that a contemporaneous waiver of an executory condition, or condition subsequent,

ing arbitration. *Milwaukee Mechanics' Ins. Co. v. Schallman*, 188 Ill. 213, 59 N. E. 12. See *Hickerson v. Insurance Co.*, 96 Tenn. 193, 33 S. W. 1041, 32 L. R. A. 172; *Hayes v. Insurance Co.*, 170 Mass. 492, 49 N. E. 754; *Manchester Fire Assur. Co. v. Koerner*, 13 Ind. App. 372, 40 N. E. 1110; *Virginia Fire & Marine Ins. Co. v. Cannon*, 18 Tex. Civ. App. 588, 45 S. W. 945; *Brock v. Insurance Co.*, 102 Mich. 583, 61 N. W. 67, 26 L. R. A. 623, 47 Am. St. Rep. 562.

cannot be proved by parol testimony.³⁰ (2) A general agent delivers to the insured a policy which purports to insure his property against destruction by fire, and receives from the insured the premium paid for such insurance, although the agent knows full well that a part of the property which he professes to insure is on leased ground, which fact, by the terms of a condition written in the policy delivered, makes the policy absolutely void in its inception.³¹ Again an agent of the insurer, in preparing the application, through mistake or fraud, falsely writes in the application answers that have been truthfully given by the applicant; the applicant signs the falsified application; and subsequently the insurer, through his agent, delivers to the applicant a policy which contains a provision making it void in its inception by reason of the false statement written in the application. The agent delivering the policy on behalf of the company knows that the policy is void if the condition referred to is to be enforced.³² These are typical cases involving the application of the peculiar doctrine of equitable estoppel as especially applied in actions upon insurance contracts. It is clear that there is fraud on the part of the insurer's agent in pretending to make a valid contract, when by its terms he knows it to be invalid, and that the insured, if acting in good faith, has been misled into paying money for a contract which by its terms conferred no benefit whatsoever upon him. Therefore the insured would have his remedy at law in an action to recover the premiums paid, or in equity in a suit for reformation or rescission. But under the peculiar facts of these cases, such usual remedies would be wholly inadequate, and far from doing justice between the parties. For usually it is only when a loss occurs that the insurer desires to rescind the contract, or that the insured, who has acted in good faith, learns of the fraud of the insurer's agent entitling him to a rescission; and, when a loss has occurred, the restitution of premiums paid by the insured is not at all what he desires or what he is equitably entitled to receive. He does not wish to rescind the contract, but to enforce it, despite the presence of a condition which, under the facts of the case, will, if given literal effect, render the contract unenforceable. Can he do so in an action at law? To this question different answers have been given by the American courts.

Before examining the diverse views taken by these courts, it is advisable first to state certain pertinent propositions from which there

³⁰ *Ripley v. Insurance Co.*, 30 N. Y. 136, 86 Am. Dec. 362; *United Firemen's Ins. Co. v. Thomas*, 53 U. S. App. 517, 27 C. C. A. 42, 82 Fed. 406, 47 L. R. A. 450.

³¹ See *VAN SCHOICK v. INSURANCE CO.*, 68 N. Y. 434, *Richards, Ins. Cas.* 362.

³² Compare *UNION MUT. LIFE INS. CO. v. WILKINSON*, 13 Wall. 222, 20 L. Ed. 617, *Richards, Ins. Cas.* 354.

can be no respectable dissent: (1) The insured cannot be heard to deny, in an action at law, that he has knowledge of all the statements made in an application signed by him, and of all conditions and terms of a policy accepted by him. (2) The knowledge of the agent of a fact material to a transaction on behalf of the insurer must be in all cases imputed to the insurer. (3) The law requires the exercise of a high degree of good faith on the part of both parties to the contract of insurance—of the insurer in no less degree than of the insured. (4) The insured, in demanding that the insurer shall be equitably estopped from enforcing a legal right given under the letter of his contract, must himself occupy an equitable position, and must show, on his part, conduct free from any imputation of bad faith.³³ (5) Parol contemporaneous evidence cannot be received for the purpose of contradicting a valid written instrument, whether that instrument be the policy or the application. (6) But parol evidence may always be received to show that a writing alleged to be a valid written instrument is not really what it purports to be, but is invalid, and not the obligation of the alleged parties. Another proposition stated as true in the preceding chapter, but opposed by much authority, will be thus stated and relied upon in the following discussion: (7) The rights of the parties to the contract of insurance will not be affected by attempted limitations upon the authority of the agent of the insurer, which are improper and invalid because (a) contrary to truth, as that no agent whatever can waive a condition of the policy, save in writing, or that the representative of the insurer is the agent of the insured, or (b) because such limitation is imposed upon a legal incident of the relation of principal and agent, and not upon conferred authority, as that the insurer will not be bound by representation made by or to his agent in the procurement of the insurance, or that he will be bound by only such information acquired as is written in the application.

These propositions being now regarded as true, we have next to consider whether, under facts such as exist in the typical cases set forth above, the insured shall be allowed, in an action at law, to avoid a forfeiture clearly incurred under a condition of the written policy by introducing parol evidence showing that it would be inequitable to permit the insurer to take advantage of such a forfeiture. The whole contest, however voluminously waged in the courts, narrows itself to this single issue: Does the admission of such evidence have the effect of altering or contradicting a term of the policy, and thus violating the parol evidence rule? There is need of no argument to prove that the parol evidence rule, derived by the common sense of the

³³ *Clemans v. Assembly*, 131 N. Y. 485, 30 N. E. 496, 16 L. R. A. 33; *Galbraith's Adm'r v. Insurance Co.*, 12 Bush (Ky.) 29; *NEW YORK LIFE INS. CO. v. FLETCHER*, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934.

race from its common experiences during the centuries of the common law's existence, and carefully defined by successive adjudications of common-law courts, is of too great value to yield to the demands of occasional equities in the determination of insurance causes. In speaking of this famous rule, Justice Miller, in *Union Mut. Life Ins. Co. v. Wilkinson*,³⁴ makes the following sound observations: "The great value of the rule of evidence here invoked cannot be easily overestimated. As a means of protecting those who are honest, accurate, and prudent in making their contracts, against fraud and false swearing, against carelessness and inaccuracy, by furnishing evidence of what was intended by the parties, which can always be produced without fear of change or liability of misconstruction, the rule merits the eulogies it has received. But experience has shown that in reference to these very matters the rule is not perfect. The written instrument does not always represent the intention of both parties, and sometimes it fails to do so as to either; and, where this has been the result of accident or mistake or fraud, the principle has been long recognized that under proper circumstances, and in an appropriate proceeding, the instrument may be set aside or reformed, as best suits the purposes of justice. A rule of evidence adopted by the courts as a protection against fraud and false swearing would, as was said in regard to the analogous rule known as the 'Statute of Frauds,' become the instrument of the very fraud it was intended to prevent, if there did not exist some authority to correct the universality of its application. It is upon this principle that courts of equity proceed in giving the relief just indicated; and though the courts, in a common-law action, may be more circumscribed in the freedom with which they inquire into the origin of written agreements, such an inquiry is not always forbidden by the mere fact that the party's name has been signed to the writing offered in evidence against him."

In answer to the question propounded above, Justice Miller continues in the same case: "In the case before us a paper is offered in evidence against the plaintiff containing a representation concerning a matter material to the contract on which the suit is brought, and it is not denied that he signed the instrument, and that the representation is untrue. But the parol testimony makes it clear, beyond a question, that this party did not intend to make that representation when he signed the paper, and did not know he was doing so, and in fact had refused to make any statement on that subject. If the writing containing this representation had been prepared and signed by the plaintiff in his application for a policy of insurance on the life of his wife, and if the representation complained of had been inserted by himself, or by some

³⁴ 13 Wall. 222, 20 L. Ed. 617, Richards, Ins. Cas. 354, Woodruff, Ins. Cas. 423.

one who was his agent alone in the matter, and forwarded to the principal office of the defendant corporation, and acted upon as true by the officers of the company, it is easy to see that justice would authorize them to hold him to the truth of the statement, and that, as they had no part in the mistake which he made, or in the making of the instrument which did not truly represent what he intended, he should not, after the event, be permitted to show his own mistake or carelessness to the prejudice of the corporation.

"If, however, we suppose the party making the insurance to have been an individual, and to have been present when the application was signed, and soliciting the assured to make the contract of insurance, and that the insurer himself wrote out all these representations, and was told by the plaintiff and his wife that they knew nothing at all of this particular subject of inquiry, and that they refused to make any statement about it, and yet, knowing all this, wrote the representation to suit himself, it is equally clear that for the insurer to insist that the policy is void because it contains this statement would be an act of bad faith and of the grossest injustice and dishonesty. And the reason for this is that the representation was not the statement of the plaintiff, and that the defendant knew it was not when he made the contract, and that it was made by the defendant, who procured the plaintiff's signature thereto.

"It is in precisely such cases as this that courts of law in modern times have introduced the doctrine of equitable estoppels, or, as it is sometimes called, estoppels in pais. The principle is that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not, in a court of justice, be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood, and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim.

"It has been applied to the precise class of cases of the one before us in numerous well-considered judgments by the courts of this country.³⁵ Indeed, the doctrine is so well understood and so often enforced that, if, in the transaction we are now considering, Ball, the insurance agent who made out the application, had been in fact the underwriter of the policy, no one would doubt its applicability to the present case.

³⁵ Citing *PLUMB v. INSURANCE CO.*, 18 N. Y. 392, 72 Am. Dec. 526; *Rowley v. Insurance Co.*, 36 N. Y. 550; *Woodbury Sav. Bank & Bldg. Ass'n v. Charter Oak Fire & Marine Ins. Co.*, 31 Conn. 526; *Combs v. Insurance Co.*, 43 Mo. 148, 97 Am. Dec. 383.

Yet the proposition admits of as little doubt that if Ball was the agent of the insurance company, and not of the plaintiff, in what he did in filling up the application, the company must be held to stand just as he would if he were the principal." This celebrated opinion, which has been followed by nearly all of the courts in this country, and which is of so great importance both on that account and because of its logical force and clearness of expression as to justify such an extensive quotation, closes with the following quotation from a New York case:³⁶

"By the interested or officious zeal of the agents employed by the insurance companies in the wish to outbid each other and procure customers, they not unfrequently mislead the insured by a false or erroneous statement of what the application should contain, or, taking the preparation of it into their own hands, procure his signature by an assurance that it is properly drawn and will meet the requirements of the policy. The better opinion seems to be that when this course is pursued the description of the risk should, though nominally proceeding from the insured, be regarded as the act of the insurers."

"The modern decisions fully sustain this proposition, and they seem to us founded in reason and justice, and meet our entire approval. This principle does not admit oral testimony to vary or contradict that which is in writing, but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it; that it was procured under such circumstances by the other side as estop that side from using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it."³⁷

A few of the states, however, repudiate this doctrine as laid down by the Supreme Court in the *Wilkinson Case*, and by a majority of the state courts in those cases which follow it. These dissenting courts hold that the effect of proving such an estoppel as we are now discussing, by parol, amounts to an alteration of the written contract, and a clear violation of the parol evidence rule. The courts of New Jersey have been most earnest in their support of this view, the reason for which may be best set forth by quoting the vigorous language of Beasley, C. J., in *Deweese v. Manhattan Ins. Co.*,³⁸ decided in New Jersey in 1872. In commenting upon the rule laid down in the leading

³⁶ *Rowley v. Insurance Co.*, 36 N. Y. 550.

³⁷ There is undoubtedly a growing tendency among the courts that allow parol waivers frankly to admit that in doing so the parol evidence rule is violated, and an exception established in favor of holders of insurance policies. See *Welch v. Association (Wis.)* 98 N. W. 227; *Spalding v. Insurance Co.*, 71 N. H. 441, 52 Atl. 858.

³⁸ 35 N. J. Law, 366, Richards, Ins. Cas. 369. See, also, *FRANKLIN FIRE*

New York case—*Plumb v. Cattaraugus County Mut. Ins. Co.*,³⁹ in which the doctrine permitting parol evidence to be admitted to show an equitable estoppel was first enunciated in New York, the Chief Justice said: "In my apprehension, the doctrine can be made to appear plausible only by closing the eyes to the reason of the rule which rejects, in the presence of written contracts, evidence by parol. That reason is that the common good requires that it shall be conclusively presumed in an action at law, in the absence of deceit, that the parties have committed their real understanding to writing. Hence it necessarily follows that all evidence merely oral is rejected, whose effect is to vary or contradict such expressed understanding. Such rejection arises from the consideration that oral testimony is unreliable, in comparison with that which is written. It is idle to say that the estoppel, if permitted to operate, will prevent a fraud or inequitable result. Most parol evidence contradictory of a written instrument has the same tendency, but such evidence is rejected, not because, if true, it ought not to be received, but because the written instrument is the safer criterion of what was the real intention of the contracting parties. In the case now criticised, the party insured stipulated against the existence of buildings within a definite number of feet from the insured property. By the admission of parol testimony, this stipulation was restricted and limited in its effect. This result, no doubt, was strictly just, if we assume that the parol evidence was true; but, standing opposed to the written evidence, the law presumes the reverse. The alternative is unavoidable. It is a choice between that which is written and that which is unwritten. In the case cited, the effect of the rule adopted by the court was to give a different effect to the written terms from that which they intrinsically possessed—a result induced by the admission of oral evidence. This I cannot but think was a palpable alteration of the agreement of the parties. The mistake of the court appears to have been in regarding simply the legal effects of the facts which were proved by parol. Receiving that testimony into the case, a clear estoppel was made out; but the error consisted in the circumstance that such oral evidence was, on rules well settled, inadmissible."

INS. CO. v. MARTIN, 40 N. J. Law, 568, 29 Am. Rep. 271, Woodruff, Ins. Cas. 435.

In the former case the plaintiff was not permitted to show by parol that at the time of the issue of the policy in suit the agent of the insurer knew that the property insured adjoined a stable, which fact, by the terms of the policy, render the insurance void. In the *Martin Case* the court held inadmissible evidence that the agent of the insurer had inspected the property insured, and knew that it was a country tavern, though it was misdescribed in the policy as a boarding house.

See all of the New Jersey cases collected in *Dimick v. Metropolitan Life Ins. Co.* (N. J. Err. & App.) 55 Atl. 291, 62 L. R. A. 774.

³⁹ 18 N. Y. 392, 72 Am. Dec. 526.

Present State of the Authorities.

It is believed that nearly all the states have accepted the doctrine allowing parol proof of facts contemporaneous with the delivery of the policy constituting an estoppel, whereby the insurer is prevented from obtaining the benefit of a term of his written contract, provided that term invalidates the policy in its inception.⁴⁰ Earlier cases⁴¹ in some of these states hold that such estoppels could not be proved by parol, and in New York there has been, almost up to the present time, great uncertainty as to the rule in question. As evidence of this we find, as late as 1890, the court of that state saying in *Kenyon v. Knights Templar & Masonic Mut. Aid. Ass'n*:⁴² "The cases in which knowledge of the agent through whom insurance is taken may operate to defeat the right of the company to avail itself of the fact so known at the time it is taken are those in which there is no application signed by the assured stating to the contrary of such existing fact, but rests upon a condition expressed in the policy merely. Then it may be presumed that the statement of it in the policy as required by the condition was omitted by mistake or waived. Such is not understood to be the rule when the alleged breach of warranty is founded upon a misstatement by the assured in the application made and subscribed by him."⁴³

⁴⁰ *Sternaman v. Insurance Co.*, 170 N. Y. 13, 62 N. E. 763, 57 L. R. A. 318, 88 Am. St. Rep. 625; *State Mut. Ins. Co. v. Latourette* (Ark.) 74 S. W. 300; *Born v. Insurance Co.*, 120 Iowa, 299, 94 N. W. 849.

Notice to an insurance agent at the time of the application of facts material to the risk is notice to the insurer, and will prevent it from insisting on a forfeiture for causes within the knowledge of the agent. *Home Ins. Co. v. Mendenhall*, 164 Ill. 458, 45 N. E. 1078, 36 L. R. A. 374; *Mesterman v. Insurance Co.*, 5 Wash. 524, 32 Pac. 458, 34 Am. St. Rep. 877; *Haire v. Insurance Co.*, 93 Mich. 481, 53 N. W. 623, 32 Am. St. Rep. 516; *Philadelphia Tool Co. v. British-America Assur. Co.*, 132 Pa. 236, 19 Atl. 77, 19 Am. St. Rep. 596. Conditions in a policy are waived, which, to the knowledge of an agent, would make the policy void as soon as delivered. *Menk v. Insurance Co.*, 76 Cal. 51, 14 Pac. 837, 9 Am. St. Rep. 158; *Follette v. Association*, 110 N. C. 377, 14 S. E. 923, 15 L. R. A. 668, 28 Am. St. Rep. 693; *Dowling v. Insurance Co.*, 92 Wis. 63, 65 N. W. 738, 31 L. R. A. 112. Contemporaneous parol evidence is admissible to show that the statements of the insured in the application were true, according to the interpretation put upon them by the insured. *Farmers' & Mechanics' Benev. Fire Ins. Ass'n v. Williams*, 95 Va. 248, 28 S. E. 214. A false statement made by the insured through ignorance, but known to be false to the agent, does not avoid the policy. *Hartford Ins. Co. v. Haas*, 87 Ky. 531, 9 S. W. 720, 2 L. R. A. 64; *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575, 44 Am. Rep. 177.

⁴¹ See *Jennings v. Chenango County Mut. Ins. Co.*, 2 Denio (N. Y.) 75; *Kennedy v. Insurance Co.*, 10 Barb. (N. Y.) 285; *Sheldon v. Insurance Co.*, 22 Conn. 235, 58 Am. Dec. 420. In the last case, however, the insured offered to show a parol waiver of an executory condition, which plainly could not be done.

⁴² 122 N. Y. 247, 25 N. E. 299.

⁴³ See, also, *ROHRBACH v. INSURANCE CO.*, 62 N. Y. 47, 20 Am. Rep.

But the later cases have gone the full length of holding that the plaintiff may show by parol that false statements appearing in an application signed by himself were falsely inserted by the insurer's agent, and that correct answers had in fact been made to the insurer through his agent, thus avoiding a forfeiture of the policy in accordance with its literal terms.⁴⁴

In Rhode Island the courts refuse to acquiesce in the general doctrine that the communication of the facts, as they actually exist, to the agent, will estop the insurer to claim a forfeiture by reason of a false representation due to an untrue statement inserted by the agent in the application without the consent of the insured, not, however, on the ground that parol evidence of such facts is inadmissible as contradicting a term of the policy, but because of the peculiar holding of that state that the agent, in filling out the application, acts for the applicant, and not for the insurer.⁴⁵ Following the view taken by the New Jersey court, as expressed by Chief Justice Beasley in the quotation given above, are to be found on this side of the Atlantic⁴⁶ only the courts of Massachusetts,⁴⁷ and possibly Connecticut;⁴⁸ and now, since the

451; *Alexander v. Insurance Co.*, 66 N. Y. 464, 23 Am. Rep. 76; *Allen v. Insurance Co.*, 123 N. Y. 6, 25 N. E. 309.

In *Dimick v. Insurance Co.* (N. J. Err. & App.) 55 Atl. 291, 62 L. R. A. 774, all the New York cases are set forth and examined. The conclusion of the court being "that the Court of Appeals of New York has not adhered with entire consistency to any definite rule."

⁴⁴ See *Sternaman v. Insurance Co.*, 170 N. Y. 13, 62 N. E. 763, 57 L. R. A. 318, 88 Am. St. Rep. 625; *WOOD v. INSURANCE CO.*, 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733. In the *Sternaman* Case the plaintiff was allowed to show by parol that true answers had been given to the medical examiner, and not the false ones written by the medical examiner in the application that was signed by the insured, although it was expressly stipulated that the medical examiner should be regarded as the agent of the applicant, and that the company would not be bound by any "information or statement not contained in this application, and in the statements made to the medical examiner, received or acquired at any time by any person."

⁴⁵ See *Reed v. Insurance Co.*, 17 R. I. 785, 24 Atl. 833, 18 L. R. A. 496; *Wilson v. Insurance Co.*, 4 R. I. 141; *O'Rourke v. Insurance Co.*, 23 R. I. 457, 50 Atl. 834, 57 L. R. A. 496, 91 Am. St. Rep. 643.

⁴⁶ That the English rule is firmly established in opposition to parol waivers, see *Biggar v. Assurance Co.* [1902] 1 K. B. 516, 71 K. B. 79, in which the agent in preparing the application, which he falsified, was held to represent the insured, and not the insurer.

⁴⁷ *Batchelder v. Insurance Co.*, 135 Mass. 449; *OAKES v. INSURANCE CO.*, 135 Mass. 248; *Jenkins v. Insurance Co.*, 7 Gray (Mass.) 370; *Lee v. Insurance Co.*, 3 Gray (Mass.) 583; *Barrett v. Insurance Co.*, 7 Cush. (Mass.) 175.

⁴⁸ *RYAN v. INSURANCE CO.*, 41 Conn. 168, 19 Am. Rep. 490, *Richards, Ins. Cas.* 408.

But in this case the refusal of the court to hold the insurer estopped by the agent's writing a false statement in the application was based rather on the grounds that the act was beyond the agent's authority, and that the insured

decision in the case of *Northern Assur. Co. v. Grand View Bldg. Ass'n*,⁴⁸ it would seem that the Supreme Court of the United States may be classed as an advocate of this view of the question. Prior to the decision of that case, which was rendered in January, 1902, it was generally thought that the Supreme Court had fully committed itself to the view taken by the majority of the state courts. In fact, the case of *Union Mut. Life Ins. Co. v. Wilkinson*,⁴⁹ from which we have quoted extensively, has long been regarded as the leading authority supporting this doctrine. This case has been followed in two other cases in the same court,⁵¹ and has been cited with approval in many others. In *New York Life Ins. Co. v. Fletcher*,⁵² decided in 1886, the court distinguished the *Wilkinson* Case on the ground that in the latter case the application contained no limitation upon the authority of the agent to bind his principal by making representations or receiving information on behalf of the insurer. The theory of the decision in the *Fletcher* Case, however, undoubtedly shows a tendency to depart from the doctrine announced by the court in the *Wilkinson* Case, since it approves the Connecticut case—*Ryan v. World Mut. Life Ins. Co.*⁵³—in holding that the insured could not escape the consequences of a false representation in the application that has been signed by himself by proving that correct information was given to the agent at the time the application was made. The case of *Northern Assur. Co. v. Grand View Bldg. Ass'n*⁵⁴ arose upon these facts, as found by the jury in the trial court: The defendant issued to the plaintiff a policy of fire insurance containing the usual clause avoiding the insurance if the insured then had, or should thereafter procure, any other contract of insurance on the same property without the consent of the insurer indorsed on the

could not deny knowledge of the false statement, than because parol proof of the facts was incompetent. See *Peck v. Insurance Co.*, 22 Conn. 575, and *Woodbury Sav. Bank & Bldg. Ass'n v. Charter Oak Fire & Marine Ins. Co.*, 31 Conn. 517, which seem to accord with the general rule.

⁴⁸ 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213.

The Circuit Court of Appeals for the Seventh Circuit has also apparently so held. See *Union Nat. Bank v. German Ins. Co.*, 34 U. S. App. 397, 18 C. C. A. 203, 71 Fed. 473.

⁴⁹ 13 Wall. 222, 20 L. Ed. 617, *Richards, Ins. Cas.* 354, *Woodruff, Ins. Cas.* 423.

⁵¹ *American Life Ins. Co. v. Mahone*, 21 Wall. 152, 22 L. Ed. 593; *Eames v. Insurance Co.*, 94 U. S. 621, 24 L. Ed. 298.

⁵² *NEW YORK LIFE INS. CO. v. FLETCHER*, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934, *Woodruff, Ins. Cas.* 527.

⁵³ *RYAN v. INSURANCE CO.*, 41 Conn. 163, 19 Am. Rep. 490, *Richards, Ins. Cas.* 408.

But that the insured is not in all cases bound by all the terms written in a policy accepted without reading, see *McMaster v. Insurance Co.*, 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. 64.

⁵⁴ 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213.

policy in writing. It also contained the stipulation that no representative of the company should have power to waive this condition unless such waiver should be written on the policy. At the time of the issue of this policy the insured had other insurance on the same property, of which he gave information to the agent of the insurer, but the consent of the insurer was not indorsed on the policy. The sum of these two concurrent policies was \$4,000, while the total value of the property insured at the time it was destroyed by fire was \$4,140. Proofs of loss being duly made, the insurer declined to pay on the ground that the policy had become void by breach of the condition against other insurance. In the Circuit Court the plaintiff was allowed to introduce parol evidence showing that the other insurance was known to the agent at the time of the issue of the policy in suit, and the insurance company was held to be estopped thereby to claim the benefit of the forfeiture under the condition against other insurance. In the Circuit Court of Appeals for the Eighth Circuit,⁵⁵ the judgment of the lower court was affirmed; Sanborn, J., dissenting. In the Supreme Court of the United States, however, the judgment of the Circuit Court of Appeals was reversed by a divided court; Chief Justice Fuller and Justices Harlan and Peckham dissenting. The majority of the court held that evidence of the information given to the agent of the existence of other insurance was not admissible to establish an estoppel against the insurer, but on what grounds this decision is based it is extremely difficult to ascertain. They are probably to be found in this extract from the opinion of Mr. Justice Shiras, which the great importance of the case justifies our quoting: "The plaintiff's case stands solely on the proposition that because it is alleged, and the jury have found, that the agent had notice or knowledge of the existence of insurance existing in another company at the time the policy in suit was executed and accepted, and received the premium called for in the contract, thereby the insurance company is estopped from availing itself of the protection of the conditions contained in the policy. In other words, the contention is that an agent with no authority to dispense with or alter the conditions of the policy could confer such power upon himself by disregarding the limitations expressed in the contract; those limitations being, according to all the authorities, presumably known to the insured. It was not shown that the company, when it received the premium, knew of the outstanding insurance, nor that, when made aware of such insurance, it elected to ratify the act of its agent in accepting the premium. On the contrary, all the record discloses is that the jury found that the agent knew, when the policy in the defendant company was issued and delivered to the plaintiff, that there was then subsisting fire insurance to the amount of \$1,500 in another fire in-

⁵⁵ 41 C. C. A. 207, 101 Fed. 77.

insurance company, and that such knowledge had been communicated to the agent by or on behalf of the assured. There is no finding that the agent communicated to the company, or to its general agent at Chicago, at the time he accounted for the premium, the fact that there was existing insurance on the property, and that he had undertaken to waive the applicable condition. Indeed, it appears from the letter of defendant's manager at Chicago, to whom the proofs of loss had been sent, which letter was put in evidence by the plaintiff, and is set forth in the bill of exceptions, that the additional insurance held by the plaintiff was without the knowledge or consent of the company; and it further appears, and was found by the jury, that, immediately on the company's being informed of the fact, the amount of the premium was tendered by the agents of the company to the insured. So that there is not the slightest ground for claiming that the insurance company, with knowledge of the facts, either accepted or retained the premium. The plaintiff's case, at its best, is based on the alleged fact that the agent had been informed at the time he delivered the policy and received the premium that there was other insurance. The only way to avoid the defense and escape from the operation of the condition is to hold that it is not competent for fire insurance companies to protect themselves by conditions of the kind contained in this policy. So to hold would, as we have seen, entirely subvert well-settled principles declared in the leading English and American cases, and particularly in those of this court." From the portion of the opinion thus quoted, it will be seen that Justice Shiras apparently gives the following reasons for a decision that is opposed to the strong and almost unbroken current of American authority, and certainly inconsistent with the leading early cases decided by the Supreme Court: (1) That the agent, by reason of the conditions contained in the policy, presumably known to the insured, had no authority to alter the conditions of the policy, and that he could not confer such power on himself. As to this statement, it is submitted that, whatever may be the validity of such a limitation upon the agent's power to waive conditions subsequent, it cannot have any effect upon his power while representing his company in making a contract, so to act as to estop the company from insisting upon a condition precedent, which the insured had a right to suppose, under the circumstances, had been waived.⁵⁶ (2) That there was no evidence that the agent communicated to the company his knowledge of the other insurance existing at the time the policy in suit was de-

⁵⁶ On this point, see especially *WOOD v. INSURANCE CO.*, 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733, cited by the court, 183 U. S., at page 327, 22 Sup. Ct. 133, 46 L. Ed. 213. See, also, *Continental Life Ins. Co. v. Chamberlain*, 132 U. S. 304, 10 Sup. Ct. 87, 33 L. Ed. 341; *Medley v. Insurance Co. (W. Va.)* 47 S. E. 101.

livered, and that therefore the company had never had knowledge of such other insurance. (3) That the company had never ratified the act of the agent in delivering the policy with knowledge of the other insurance, since, upon acquiring information of that fact, it had immediately tendered the amount of the premium to the insured.

In view of the authorities, as well as of the principles of reason involved, the reasons thus given for so radical a departure from a doctrine so generally accepted as that of the admissibility of evidence of parol contemporaneous waivers seem truly remarkable. The doctrine of the New Jersey cases, which are approved by Justice Shiras in the opinion under discussion, is at least logical and consistent throughout. Those cases hold that the evidence is simply inadmissible because it alters a written contract, and that the mode of making the contract is immaterial—whether it was made directly with the insurer, or by the intervention of an agent. But the inference to be drawn from the opinion of the Supreme Court in the Northern Assurance Company Case is that if the information had been given to the insurer, or to an agent having the power to receive that information, evidence thereof would have been admissible to show an estoppel, but that another—an entirely different—rule applies in this case, because, forsooth, the policy, delivered after the virtual completion of the contract, contained a stipulation that the agent, who had up to that time been the sole representative of the insurer in the premises, had no authority to waive any condition of that policy. Such an *ex post facto* restriction is clearly incompetent to limit the apparent powers of the insurer's agent, even if it be granted that such a restriction can be valid at all when questions of such estoppels as we are now discussing are involved. There seems to be no legitimate means of escape from the conclusion that, as to all transactions affecting the inception of the policy, the knowledge of the agent must, as a matter of law, be deemed to be the knowledge of the insurer.

Nor is the position of the court, essentially weak in itself, well fortified by authority. The court, after citing some early English cases, none of which are directly in point, cites cases from Massachusetts and Connecticut, and makes long quotations from New Jersey cases, in all of which states, as heretofore stated, the prevailing doctrine as to parol estoppels is denied. It then cites some New York cases, which, however, are admitted to have been overruled. Other cases are cited from Michigan, Rhode Island, and Vermont, holding that an agent can waive conditions only in the mode prescribed by the policy. These cases, however, refer only to the waiver of conditions subsequent, and do not involve the question of estoppel to claim a forfeiture under a condition precedent, affecting the inception of the contract.

The strongest support for the decision in the principal case is found

in *Carpenter v. Providence Washington Ins. Co.*,⁵⁷ in which the facts were very similar, except that in the *Carpenter* Case there was not only existing insurance, alleged to have been known to the agent of the insurer, but there was also other insurance subsequently procured in clear violation of the condition of the policy providing that such other insurance should avoid the policy unless consent thereto was indorsed on the policy in writing. In that case, in an opinion by Story, J., the court held that parol notice given to the agent of such other insurance was not a sufficient compliance with the conditions of the policy. It is plain, however, from the opinion, that the court had in mind as much the breach of the condition subsequent as of the condition precedent; and, as we have already seen, a majority of the courts hold that any mode of waiving a condition subsequent required by the policy must be strictly complied with, if insisted upon. Further, it has generally been thought that the *Carpenter* Case, in so far as it holds that a parol contemporaneous waiver cannot be shown, had been repudiated by the Supreme Court in subsequent decisions.⁵⁸

The court disposed in summary manner of the previous cases in the same court which had been supposed to have committed it to the view that parol evidence of facts communicated to the agent is admissible to prove such an estoppel as was claimed by the plaintiff in the case. *Union Mut. Life Ins. Co. v. Wilkinson*⁵⁹ was distinguished on the ground that the false statement made in the signed application was not a part of the contract, so that the evidence of such falsity was admissible, as, in effect, proving the non-execution of the statement. But the case of *American Life Ins. Co. v. Mahone*,⁶⁰ in which the false statements were made warranties and parts of the policy, and which expressly followed *Union Mut. Life Ins. Co. v. Wilkinson*, is not even mentioned by the court; nor is *Continental Life Ins. Co. v. Chamberlain*.⁶¹ *Eames v. Insurance Co.*,⁶² which also expressly fol-

⁵⁷ 16 Pet. 495, 10 L. Ed. 1044.

⁵⁸ See *McElroy v. Assurance Co.*, 94 Fed. 997, 36 C. C. A. 615; *Pechner v. Insurance Co.*, 65 N. Y. 207. See, also, *Fireman's Fund Ins. Co. v. Norwood*, 32 U. S. App. 490, 69 Fed. 74, 78, 16 C. C. A. 136.

⁵⁹ *Union Mut. Life Ins. Co. v. Wilkinson*, 13 Wall. 222, 20 L. Ed. 617, *Richards, Ins. Cas.* 354, *Woodruff, Ins. Cas.* 423.

⁶⁰ 21 Wall. 152, 22 L. Ed. 593.

⁶¹ 132 U. S. 304, 10 Sup. Ct. 87, 33 L. Ed. 341. In this case the plaintiff was allowed to show by parol that the insured had told the agent, who was made the agent of the insurer by an Iowa statute, that he had other insurance in fraternal associations, which the agent declared to be no insurance, and so wrote in the application. The court seemed to distinguish this case from the *Fletcher* Case on the ground that the limitations in the policy upon the power of the agent to modify or waive any terms of the contract were, in a sense, negated by the statute, and that the term "other insurance" was not of such

⁶² 94 U. S. 621, 24 L. Ed. 298.

lows the *Wilkinson* Case, was distinguished on the same principle as was that case.

In concluding this discussion of the *Northern Assurance* Case, the length of which is excused only by the great importance of the principle involved, it is proper to note that the facts as found by the jury come dangerously near to justifying an imputation of bad faith on the part of the insured. Even the well-known liberal valuation of the jury placed the value of the property insured at little more than \$100 beyond the aggregate sum of the two concurrent policies. No insurance company would be willing so completely to cover with insurance any property, as the temptation to secure a ready and easy market for the property by incendiary means would be too great to make the risk safe. The insured in this case must have known that this second insurance contract was in fraud of the company, and, as we have already seen, the insured is in no position to claim an estoppel as against the insurer unless his own hands are clean. He must have been honestly misled by the act alleged as an estoppel. It is probable that this suspicion of fraud on the part of the plaintiff in this case had much to do with inducing the majority of the court to deliver an opinion which cannot but be regretted. For there can be little doubt but that, whatever may be the merits of the particular case, students of insurance law will join the Chief Justice and Justices Harlan and Peckham in their dissent from the opinion as written by Justice Shiras.⁶³

certain meaning as to preclude the admission of parol evidence to explain it. See this case followed, and the *Northern Assur. Co.* Case distinguished, in *Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co.*, 124 Fed. 25, 59 C. C. A. 545.

⁶³ It is probable that this case will not be generally followed. In concluding his opinion in *Virginia Fire & Marine Ins. Co. v. Richmond Mica Co.* (Va. 1904) 46 S. E. 463, Whittle, J., speaks as follows: "Much reliance has been placed by counsel for the plaintiff in error upon the opinion of Mr. Justice Shiras in the case of *Northern Assur. Co. v. Grand View Bldg. Ass'n*, 183 U. S. 308, 23 Sup. Ct. 183, 46 L. Ed. 214, reversing the judgment of the Circuit Court of Appeals of the Eighth Circuit. While the pronouncements of that great court must always command the highest respect, its judgment in the particular case is deprived of much value as a precedent by the circumstance that it is not in harmony with many former decisions of that court, and that the Chief Justice, Mr. Justice Harlan, and Mr. Justice Peckham did not concur in the opinion of the majority. Since that decision was rendered, Mr. Justice Shiras has retired from the bench, and been succeeded by Mr. Justice Day, who presided in the Circuit Court of Appeals in the case of *Queen Insurance Co. v. Union Bank & Trust Co.*, 111 Fed. 699, 49 C. C. A. 555, where a different conclusion was reached. So there are now on that bench at least four justices who entertain views opposed to those of the majority, as expressed in the case referred to. In this state of the law, this court can hardly be expected to abandon its own well-considered precedents to follow

Summary.

As the conclusion to be drawn from the foregoing discussion of the cases, we may add this proposition to those which have been previously stated: That when an insurer, through his agent, delivers a policy of insurance as a valid contract, and receives the premium payable thereunder as for valid insurance, knowing at the time of delivery that the contract, in accordance with its terms, is null and void, the insurer will be deemed to have waived the operation of the avoiding conditions; and evidence of such a waiver or estoppel may be by parol. Such evidence is received, not for the purpose of altering the written contract made by the parties, or of varying any of its terms, nor to show that the contract intended to be made was different from the contract as written, but merely for the purpose of showing that, under the circumstances attending the making of that contract, it is inequitable for the insurer to claim any advantage under the terms in question. The rule above stated—that the insured, by signing the application or accepting a delivered policy, must be deemed to consent to all the terms written therein—does not interfere with the application of the principle just stated. He must admit that the policy received, and upon which he seeks to recover, is the contract which he made; but even then he may show by parol such facts as will estop the insurer to enforce some of the conditions of the contract thus admitted to have been made. But here again must be noted an important difference between the constructive knowledge of the contents of the application or policy which the law must necessarily impute to the insured, and his actual knowledge of falsehood or fraud in these instruments. When the insured has no actual knowledge of falsehood or fraud in these instruments, he will not be affected with bad faith, and is therefore in a condition to claim an estoppel. But if he has such actual knowledge, he aids and abets the insurance agent in his purpose to defraud the insurer, and should not be heard demanding any equitable relief from the legal consequences resulting from his own fraudulent conduct.⁶⁴

the questionable ruling of another tribunal." See, also, *Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co.*, 124 Fed. 25, 59 C. C. A. 545, distinguishing the *Northern Assur. Co. Case*. The *Northern Assur. Co. Case* was followed in West Virginia in *Maupin v. Insurance Co.*, 45 S. E. 1003, but disapproved in *Medley v. Insurance Co.*, 47 S. E. 101, 105. It is also disapproved in *Orient Ins. Co. v. McKnight*, 197 Ill. 190, 64 N. E. 339.

⁶⁴ *NEW YORK LIFE INS. CO. v. FLETCHER*, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934; *Clemans v. Supreme Assembly*, 131 N. Y. 485, 30 N. B. 496, 16 L. R. A. 33; *Lewis v. Insurance Co.*, 39 Conn. 100. But see *Sun Life Ins. Co. v. Phillips* (Tex. Civ. App.) 70 S. W. 603.

WHAT CONSTITUTES A WAIVER.

125. The insurer will be deemed to have waived a right existing under a contract of insurance only when the following circumstances exist:
- (a) The right must be known to the insurer or his proper agent.
 - (b) The words or conduct of the insurer must be such as to cause the insured reasonably to believe that such right has been relinquished.
 - (c) The insured must, in honest reliance upon such belief, act in such a way as to change his condition, and subject himself to loss or injury if the right were insisted upon.
126. In some jurisdictions waivers lacking the third element (c) above are enforced; the intention of the insured to regard the forfeited policy as still existing being regarded as sufficient, irrespective of its expression or its effect upon the conduct of the insured. It is difficult to justify such a doctrine on either principle or authority.

Assuming that evidence for the purpose of showing a parol waiver of conditions in an insurance policy is admissible, it next becomes necessary to determine what facts must be proved to exist in order to establish such a waiver. In view of the present state of the authorities, this determination is not without difficulty. In some jurisdictions the terms "waiver" and "estoppel" are divorced from their usual joint significance, so that evidence not sufficient to constitute a technical estoppel will be regarded as sufficient to raise an implication of a waiver, while other courts hold that nothing short of proof of an estoppel will establish an implied waiver. The distinction existing between a strict waiver and an estoppel has already been discussed. When the waiver is express, the distinction is not difficult; but it was concluded that, when the waiver is to be implied from the conduct of the insurer, by the better authority, the distinction ceases to be of practical importance. It therefore becomes necessary now to state the elements that go to make up such an implied waiver or estoppel.

A Right cannot be Waived unless Known.

An estoppel is established for the purpose of preventing a wrong. It cannot be possible for the insurer to wrong the insured by a course of conduct upon which the latter may rely to his prejudice unless the insurer knew of the existence of the right which his conduct appears to ignore. The mere fact that the insured mistakes the meaning of the insurer's conduct cannot affect the rights of the parties where the insurer was ignorant of the circumstances which caused his conduct to be misleading.⁶⁵ Thus, if the insurer, knowing of the breach of a con-

⁶⁵ *Globe Mut. Life Ins. Co. v. Wolff*, 95 U. S. 326, 24 L. Ed. 387; *Security Ins. Co. v. Fay*, 22 Mich. 467, 7 Am. Rep. 670; *Allen v. Insurance Co.*, 12 Vt. 366;

dition of the policy which would avoid it in accordance with its terms, accepts a premium, the insured may naturally enough infer that the insurer does not intend to insist upon the forfeiture to which he is entitled, and, so thinking, continues to pay his premiums, which he certainly would not do if he considered the policy annulled. The insurer knows that he is misleading the insured to his hurt, and thereby wrongs him; consequently he is estopped by the law from reaping the reward of his own wrong. So the receipt by the insurer of a premium paid after a breach of condition which is unknown to him may induce the insured to continue his payments upon the supposition that a forfeiture will not be claimed. But here the insurer has done the insured no legal wrong, not having consciously misled him. Therefore he is not estopped to set up the breach of condition as creating a forfeiture. So, in *Globe Mut. Life Ins. Co. v. Wolff*,⁶⁶ it was held that the receipt of a premium by the insurer without knowledge that the insured was then residing in a district prohibited by the policy would not waive a forfeiture already incurred on account of the breach of this condition of residence.

The Conduct of the Insurer must be Misleading.

The insurer cannot be estopped unless his words and conduct were such as to give the insured reasonable cause for believing that he had relinquished the right in question. Mere silence on the part of the insurer after acquiring knowledge of the right to enforce a forfeiture will not afford the insured any reasonable ground for supposing that

Finley v. Insurance Co., 30 Pa. 311, 72 Am. Dec. 705; *Moore v. Life Ass'n* (Mich.) 95 N. W. 573; *Dover Glassworks Co. v. American Fire Ins. Co.*, 1 Marv. (Del.) 32, 29 Atl. 1039, 65 Am. St. Rep. 264.

In *Skinner v. Norman*, 165 N. Y. 565, 59 N. E. 309, 80 Am. St. Rep. 776, the agent of the insured, who procured the insurance, told the insurer that he did not know whether the property was incumbered or not. The insurer issued the policy without further inquiry, and was held to thereby waive that provision of the policy declaring the insurance void if the property should be incumbered.

The knowledge of the insurer must be of such character as to effect his conscience. Constructive notice is not sufficient. Therefore record of an incumbrance is not such notice to the insurer as to affect him with an estoppel. *Phoenix Ins. Co. v. Overman*, 21 Ind. App. 516, 52 N. E. 771; *Milwaukee Mechanics' Ins. Co. v. Niewedde*, 12 Ind. App. 145, 39 N. E. 757.

So, by the better authority, the insurance company is not charged with knowledge of statements made in previous applications of the insured, kept on file, so as to be estopped to take advantage of a misrepresentation in a subsequently accepted application, unless the officers of the company had actual knowledge of such statements. *Hackett v. Supreme Council*, 168 N. Y. 588, 60 N. E. 1112, affirming 44 App. Div. 524, 60 N. Y. Supp. 806.

Contra, *O'Rourke v. Insurance Co.*, 23 R. I. 457, 50 Atl. 834, 57 L. R. A. 496, 91 Am. St. Rep. 643.

⁶⁶ 95 U. S. 326, 24 L. Ed. 387.

the insurer does not at the proper time intend to claim the benefit of the forfeiture,⁶⁷ unless the terms of the policy or the peculiar circumstances of the case impose upon him the duty of affirmative action.⁶⁸ In opposition to this principle, however, it is held in many states that it is the duty of the insurer to inform the insured of a forfeiture that has come to his knowledge, and to declare the policy canceled, and that if he fails to do so, and allows the insured to continue in the belief that the policy is still valid, the insurer will be estopped to deny its validity.⁶⁹

These latter cases appear to proceed upon the theory that a stipulation that a specified act—procuring other insurance, for example—shall render the policy “void,” is to be construed as if it read “voidable at the option of the insurer”; thus requiring affirmative action on the part of the insurer in order to avoid the contract, as in the case of forfeiture of a lease for condition broken by entry of the lessor. But, it seems more reasonable, and certainly more in accord with authority, to regard the contract of insurance after the breach of a condition that by its terms renders the insurance “void,” not as merely voidable, but rather as void until revived by an affirmative act of the insurer. The view that the contract after condition broken becomes merely voidable, and so binding upon the insurer until avoided by cancellation within a reasonable time, and before loss, is well illustrated by *Swedish-American Ins. Co. v. Knutson*.⁷⁰ A provision of the contract declared that the policy should be “null and void” if the insured should procure other insurance without the consent of the insurer, to be noted on the policy. Without consent, the insured procured other insurance, and then no-

⁶⁷ *Equitable Life Assur. Soc. v. McElroy*, 83 Fed. 631, 28 C. C. A. 365; *Adreveno v. Life Ass'n* (C. C.) 38 Fed. 806; *Gibson Electric Co. v. Liverpool & London & Globe Ins. Co.*, 159 N. Y. 418, 54 N. E. 23; *Armstrong v. Insurance Co.*, 130 N. Y. 560, 29 N. E. 991; *Titus v. Insurance Co.*, 81 N. Y. 410; *Mueller v. Insurance Co.*, 87 Pa. 399; *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388; *Boyd v. Insurance Co.*, 90 Tenn. 212, 16 S. W. 470, 25 Am. St. Rep. 676; *Findelsen v. Insurance Co.*, 57 Vt. 520; *JOHNSON v. INSURANCE CO.*, 41 Minn. 396, 43 N. W. 59; *Insurance Co. v. Kittle*, 39 Mich. 51; *Robinson v. Fire Ass'n*, 63 Mich. 90, 29 N. W. 521; *Davey v. Insurance Co.*, Fed. Cas. No. 3,590; *West End Hotel & Land Co. v. American Fire Ins. Co.* (C. C.) 74 Fed. 114; *Morrow v. Insurance Co.*, 84 Iowa, 256, 51 N. W. 3.

⁶⁸ For a case in which the circumstances were such as to impose on the insurer a duty to speak, so that silence worked a proper estoppel, see *Benninghoff v. Insurance Co.*, 93 N. Y. 503. Also, see *Morrison v. Insurance Co.*, 69 Tex. 353, 6 S. W. 605, 5 Am. St. Rep. 63.

⁶⁹ *Phoenix Ins. Co. v. Splers*, 87 Ky. 285, 8 S. W. 453; *Grubbs v. Insurance Co.*, 108 N. C. 472, 13 S. E. 236, 23 Am. St. Rep. 62; *Hamilton v. Insurance Co.*, 94 Mo. 353, 7 S. W. 261; *Williamsburg City Fire Ins. Co. v. Cary*, 83 Ill. 453; *Phoenix Ins. Co. v. Johnston*, 143 Ill. 106, 32 N. E. 429; *Orient Ins. Co. v. McKnight*, 197 Ill. 190, 64 N. E. 339; *Home Ins. Co. of New York v. Marple*, 1 Ind. App. 411, 27 N. E. 633.

⁷⁰ 67 Kan. 71, 72 Pac. 526.

tified the insurer of that fact. The latter made no response to this notice, and was held thereby to have waived its right to avoid the policy, the court saying: "The company claims that, even though it received proper notice of the additional insurance, it did not indorse its consent thereto upon the policy, and hence that the policy was void. Some two months elapsed from the giving of the notice until the loss occurred. Upon receiving the notice the company had a right to take advantage of the provisions of its policy and by-laws. The provisions quoted therefrom were inserted for its sole benefit. When it assumed to remain passive, the assured was deprived of any opportunity to protect himself if the policy were to be forfeited. The term 'void,' as used in the contract, is to be regarded as meaning that the insurer had, at its exclusive option, the right to treat the policy as a nullity. It was put to its election whether or not it would do so upon receipt of the notice, and, having failed to act within a reasonable time, it is estopped to claim a forfeiture when it became to its advantage to do so, after loss had occurred."

In conclusion we may safely say that by the better reasoned cases, if not by the clear weight of authority, mere silence is not sufficient to constitute a waiver, in the absence of circumstances of estoppel. The insurer must have actually and consciously misled the insured.

The Insured must have been Prejudiced.

By what appears to be the better reason, and by the better considered, though not the more numerous, cases, it is held not to be sufficient that the insurer has done acts manifesting his intention to regard a policy as still existing, although knowing a ground of forfeiture. It is further necessary that the insured, acting in reliance upon this intention of the insurer, as expressed by his acts, shall have so changed his position as to be left in a worse condition than would have been his if he had known that the forfeiture was to be enforced. That is to say, the insured must have relied upon this apparent intention of the insurer, and so have been induced to pay out money or do some other act which he would otherwise have left undone, or in some other way have suffered detriment. In short, an implied waiver should not be considered as established unless the insured shall have proved the existence of all facts necessary to constitute an estoppel in pais.

The Opposing View—No Estoppel Necessary.

In some jurisdictions the waiver of rights under insurance policies has been assimilated to that different class of waivers to be found in other branches of the law, whereby a person entitled to escape a just obligation by pleading a mere technical defense declines to avail himself of that right. Such waivers do not require any consideration, and elements of estoppel are only faintly to be discerned in cases in which

they arise. Thus a person may, without consideration or estoppel, bind himself by his waiver of a right to plead the statute of limitations, if he relinquishes that right in the manner prescribed by law. So a surety entitled to plead in defense of an action on the debt an extension of time to the principal debtor may waive that right by merely acknowledging himself to be liable.⁷¹ Such a waiver is binding without consideration or estoppel. Likewise the indorser of a negotiable instrument may waive a defense of a lack of notice of dishonor by merely promising to pay, without more.⁷² Waivers of this class are peculiar, resting largely upon the conditions which have given rise to the peculiar rules governing in the law merchant, and can scarcely serve as proper precedents or even analogues for the determination of insurance causes. Nevertheless there is undoubtedly a strong tendency manifested by the courts to extend to the insurance contract the rule validating waivers that are supported neither by a consideration, nor by circumstances of estoppel. This is especially true with regard to those conditions of the insurance policy that pertain to matters after a loss, such as those requiring notice of loss, or proofs of loss, appraisal, or arbitration. These conditions, operating subsequently to the loss, do not go to the main purpose of the contract, which is to secure current protection. After the loss takes place, the liability of the insurer becomes fixed in accordance with the executed terms of the contract, and the purpose of these subsequently operating conditions is merely to put the insurer in possession of such facts and information as may be necessary to enable him fairly to adjust the loss. They operate by their breach to defeat a right already fixed, as do conditions subsequent. They are therefore regarded with even more of disfavor by the courts than are those other conditions operating before a loss, as conditions precedent to the continued existence of the policy. This distinction is made strikingly manifest by the rule already stated—that, while circumstances rendering the payment of a premium at the time of its maturity absolutely impossible do not prevent the forfeiture of the insured's rights in accordance with the terms of the policy, yet impossibility of giving notice of loss or proofs of loss within a stipulated time does excuse a failure to do so.⁷³ In view of the highly technical character of these conditions to be performed after loss, the courts go great lengths in order to prevent merely technical forfeitures. In order to do this, it has been distinctly held in some states that any expression of intention, or any conduct from which can be implied an intention on the part of the in-

⁷¹ See *Hooper v. Pike*, 70 Minn. 329, 72 N. W. 829, 68 Am. St. Rep. 512.

⁷² *Sigerson v. Mathews*, 20 How. 496, 15 L. Ed. 989.

⁷³ See *ante*, p. 96.

suror not to claim a technical forfeiture, will constitute a waiver,⁷⁴ which, being once made, can never be revoked.⁷⁵ Thus in a Michigan case⁷⁶ proofs of loss that were furnished a few days later than required by the policy were retained by the insurer without objection being made either to their form or contents or time of presentation. It seems that the insurer also made repairs upon another building covered by the same policy, and damaged by the same fire. It was held that these acts of the insurer were sufficient evidence of an intention on his part not to object to the failure of the insured to furnish the proofs of loss in season. The acts of the insurer apparently recognizing the validity of the policy did not cause the insured to change his position or act otherwise to his prejudice. Since the insurer at all times kept within his rights, and did no wrong to the insured, there seems to be no reason why he should not have been allowed to enforce his contract as it was made.⁷⁷

A somewhat similar case has recently been decided in Indiana.⁷⁸ In this case the policy required proofs of loss to be furnished within sixty days. The insured sought to show a waiver of this condition by proving that the company had declined to pay the policy, not because of the breach of this condition, but on an entirely different ground. The court held very properly that, if the refusal to pay took place before the expiration of the sixty days within which the proof of loss could be made, the insurer was thereby estopped to complain of the failure of the insured to give such proofs. But in holding the pleading of the plaintiff to be good, the court went further, and held that, even though the refusal of the insurer to pay was given after the expiration of the sixty days, it would nevertheless constitute a waiver of the condition requiring proofs of loss. Such a holding would seem to be indefensible, and in the last paragraph of the opinion the court apparently recedes from its advanced position.

⁷⁴ *Home Fire Ins. Co. v. Kuhlman*, 58 Neb. 488, 78 N. W. 936, 76 Am. St. Rep. 111.

⁷⁵ *Home Fire Ins. Co. v. Kuhlman*, 58 Neb. 488, 78 N. W. 936, 76 Am. St. Rep. 111; *Bennett v. Insurance Co.*, 203 Ill. 439, 67 N. E. 971; *Platt v. Insurance Co.*, 153 Ill. 113, 38 N. E. 580, 26 L. R. A. 853, 46 Am. St. Rep. 877.

⁷⁶ *Hibernia Ins. Co. v. O'Connor*, 29 Mich. 241. To the same effect, see *Welss v. Insurance Co.*, 148 Pa. 349, 23 Atl. 991.

⁷⁷ See *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278, 49 Am. Dec. 74.

⁷⁸ *Germania Fire Ins. Co. v. Pitcher*, 160 Ind. 392, 64 N. E. 921. In this case there was evidence that the delay of the insured was caused by protracted and misleading negotiations for settlement, which should always estop the insurer to complain of the natural consequences of his own conduct. See *Gristock v. Insurance Co.*, 84 Mich. 161, 47 N. W. 549; *Id.*, 87 Mich. 428, 49 N. W. 634; *Eastern R. Co. v. Relief Fire Ins. Co.*, 105 Mass. 570; *State Ins. Co. v. Todd*, 83 Pa. 272; *Burlington Ins. Co. v. Toby*, 10 Tex. Civ. App. 425, 30 S. W. 1111.

Same—The New York Decisions.

The decisions of the Court of Appeals of New York have done much to throw the law into confusion, and are far from being consistent and harmonious among themselves. In the leading case of *Titus v. Insurance Co.*,⁷⁹ the insurer defended on the ground that the policy was avoided in accordance with its terms by the foreclosure of a mortgage upon the property insured. But it was held that the act of the insurer, after he had notice of the breach of condition, in requiring the insured to submit to an examination under oath, and thus to be put to trouble and expense, amounted to a waiver of the forfeiture. The waiver was based specifically on the fact that the insurer recognized the contract as valid when he required the insured to do acts which he was bound to do only under the contract. In so holding, the court said: "But it may be asserted broadly that if, in any negotiations with the insured, after knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the insured by virtue thereof to do some act or incur some trouble or expense, the forfeiture is, as matter of law, waived; and it is now settled by this court, after some difference of opinion, that such a waiver need not be based upon any new agreement or an estoppel." This case was approved and followed by numerous subsequent cases, until in 1892, in *Armstrong v. Insurance Co.*,⁸⁰ it was stated that, in the absence of an express waiver, there must exist some of the elements of an estoppel before the insurer could be deemed to have waived any condition of the policy. But in *Kiernan v. Insurance Co.*,⁸¹ the court suffered a serious relapse. In that case it was held that the insurer had waived his right to insist upon a forfeiture of the policy incurred by a breach of the condition forbidding the incumbrance of the property insured without the consent of the insurer, by proceeding with an appraisal of the loss after knowledge of the breach of condition, although the policy contained an express provision that no proceeding relating to the appraisal should be deemed a waiver of any condition of the policy. In its opinion the court said: "There may be a waiver by express agreement, or through estoppel; but neither is required to effect that result, as words or acts from which an intention to waive may reasonably be inferred are sufficient, at least when acted upon." In the latest case—*Gibson Electric Co. v. Liverpool & London & Globe Ins. Co.*,⁸²—the court reviews all of the preceding cases, and manifests a strong disposition to adopt the sound view that a waiver cannot be valid unless supported either by a consideration or by circumstances of estoppel. In holding that the insurer's continuation of appraisal proceedings, after notice of a breach of condition avoiding the

⁷⁹ 81 N. Y. 410.

⁸⁰ 130 N. Y. 560, 29 N. E. 991.

⁸¹ 150 N. Y. 190, 44 N. E. 698.

⁸² 159 N. Y. 418, 54 N. E. 23.

policy, did not amount to a waiver of the forfeiture so incurred, the court said: "Although the decisions of this court of which we have made this brief review³³ seem to warrant the conclusion that an insurer, even under the provision of a standard policy, may estop itself from claiming or may waive a forfeiture under its conditions by its acts and the requirements it makes of the insured after knowledge of the forfeiture, still the circumstances and acts which are required to constitute such an estoppel or waiver seem to be quite firmly established. Thus, in the absence of an express waiver, at least some of the elements of an estoppel must exist. The insured must have been misled by some act of the insurer, or it must, after knowledge of the

³³ After discussing *TITUS v. INSURANCE CO.*, supra, the court thus states the results of the preceding decisions: "The question as to what constitutes a waiver of a forfeiture under the provisions of a fire insurance policy has often been considered by this court. Thus, in *Weed v. Insurance Co.*, 116 N. Y. 106, 22 N. E. 229, it was decided that, to establish a waiver of a forfeiture in a policy of insurance, the proof must show a distinct recognition of the validity of the policy after a knowledge of the forfeiture by the person by whom it is claimed such forfeiture was waived. In *Roby v. Insurance Co.*, 120 N. Y. 510, 518, 24 N. E. 810, it was declared that where, after knowledge of the forfeiture of a policy, the insurer recognizes its continued validity, does acts based thereon, and requires the insured, by virtue thereof, to do some act or incur some trouble or expense, the forfeiture is, as a matter of law, waived, and the waiver need not be based upon any new agreement, or upon estoppel. In that case it was said that 'the policy in question was void or valid as a whole. If any part was valid, it was all valid. The defendant admitted that it was operative in all its parts.' *Pratt v. Insurance Co.*, 130 N. Y. 206, 29 N. E. 117, is to the effect that where the agents or committee of an insurance company, after being apprised of facts affecting the policy, asked the insured to fill out the blank proofs of loss which they gave him, called for his books, required him to furnish information, which they knew involved trouble and loss of time for him to obtain, it was a ratification of the policy, and a waiver of the forfeiture. It was decided in *Armstrong v. Insurance Co.*, 130 N. Y. 560, 29 N. E. 991, that, while a waiver of a condition of forfeiture contained in a policy of insurance need not be based upon a technical estoppel, yet, in the absence of an express waiver, some of the elements of an estoppel must exist, and that the insured must have been misled by some action of the company, or it must have done something, after knowledge of a breach of the condition, which could only be done by virtue of the policy, or have required something from the assured which he was bound to do only at the request of the company under a valid policy, or have exercised a right which it had only by virtue of such policy. In that case it was held, as it was in the *Titus Case*, that a waiver could not be inferred from mere silence, but would require some affirmative action on the part of the insurer which indicated that it intended to waive the result of the plaintiff's breach. *Bishop v. Insurance Co.*, 130 N. Y. 488, 29 N. E. 844, is to the effect that a company issuing a policy containing a provision that it shall not be modified or changed, except in writing signed by it, may by its conduct estop itself from enforcing the provision against a party who has acted in reliance upon such conduct. Again, in *Ronald v. Association*, 132 N. Y. 378, 30 N. E. 739, it was, in effect, said that, in the absence of any agreement, a waiver of forfeiture of a policy results only from

breach, have done something which could only be done by virtue of the policy, or have required something of the assured which he was bound to do only under a valid policy, or have exercised a right which it had only by virtue of such policy."

Estoppel by Requiring Performance of the Contract.

It will be observed that, in accordance with the theory of the New York decisions, the insurer is deemed to waive any forfeiture incurred, and to recognize the policy as valid, by requiring the insured to perform any of the conditions pertaining to matters subsequent to the loss, such as furnishing proofs of loss or exhibiting accounts. This theory, however, is believed to be incorrect on principle, though supported by the undoubted weight of authority.³⁴ Assuming, as one reasonably may, that the insurer desires to act in all respects fairly

negotiations or transactions with the insured, by which the insurer, after knowledge of the forfeiture, recognizes the continued existence of the policy, or does acts based thereon, or requires the insured, by virtue thereof, to do some act or incur some expense or trouble. *Quinlan v. Insurance Co.*, 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645, is in many respects similar to the case at bar. In that case the policy contained the same provisions as the policy in suit, relating to proceedings to foreclose a mortgage, and also as to the power of an agent to waive any of the conditions or provisions of the policy; and it was held that the provisions in a policy to the effect that no representative of the company should have power to waive any condition or provision, except by writing indorsed upon the policy, were valid, and that the condition that such waiver was to be written upon the policy was of the essence of the authority of the agent to act, and that a consent or act not so indorsed was void; citing *Walsh v. Insurance Co.*, 73 N. Y. 10; *Marvin v. Insurance Co.*, 85 N. Y. 278, 39 Am. Rep. 657. Of that case it may be said, however, that it was held that the agent had no authority whatever to bind the company, in writing or otherwise, or to waive any condition of the policy. In *Kiernan v. Insurance Co.*, 150 N. Y. 190, 44 N. E. 698, it was held that, when an appraisal of the loss under a fire insurance policy is proper in any event, the fact that one was had at the request of the company has no bearing upon the question of forfeiture. The question of waiver was also considered in *Van Tassel v. Insurance Co.*, 151 N. Y. 130, 45 N. E. 365, where it was, in effect, held that, in the absence of a subsequent waiver, the rights of the insured are to be determined as of the date of the fire, and that, to establish a waiver, a preponderance of evidence is requisite. In *Walker v. Insurance Co.*, 156 N. Y. 628, 51 N. E. 392, where an insurer, after having made a contract of fire insurance, in ignorance of the existence of a chattel mortgage which rendered the insurance voidable, learned of the existence of the mortgage, and thereafter treated the policy as valid, and put the insured to trouble or expense on account thereof, it was held that those acts were evidence from which the jury might find a waiver of a forfeiture."

³⁴ *TITUS v. INSURANCE CO.*, 81 N. Y. 419; *Home Fire Ins. Co. v. Phelps*, 51 Neb. 623, 71 N. W. 303; *German Ins. Co. v. Gibson*, 53 Ark. 494, 14 S. W. 672; *Marthinson v. Insurance Co.*, 64 Mich. 372, 31 N. W. 291; *Carpenter v. Insurance Co.*, 61 Mich. 635, 28 N. W. 749; *OSHKOSH GASLIGHT CO. v. GERMANIA FIRE INS. CO.*, 71 Wis. 454, 37 N. W. 819, 5 Am. St. Rep. 233; *Grubbs v. Insurance Co.*, 108 N. C. 472, 13 S. E. 236, 23 Am. St. Rep. 62.

with regard to the settlement of a loss that has occurred, it would seem that he is justly entitled to all of the information for which he stipulated in the contract. He may have knowledge of a technical ground of forfeiture, and yet consider that his interest would be best subserved by paying the claim, despite the forfeiture, provided that the claim shall prove to be in all respects honest and equitable. In deciding upon the character of the claim, he may very properly desire the information to be obtained through the proofs of loss, or by the award of appraisers, or by the report of an adjuster. If, after securing the information desired, the insurer decides that the claim is not a just one, there seems to be no sufficient reason for denying him the right to set up the previously known ground of forfeiture. Nor can the insured justly claim that in demanding proofs of loss or the performance of other subsequent conditions of the contract, the insurer has induced him to do acts or to incur expense and trouble which otherwise he would have omitted. The insured performs these acts because he had contracted so to do, and not because the insurer had induced him to perform them.⁸⁵ It is in accordance with this principle that the standard form of fire policy provides: "This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required." This condition is valid, and will be given full effect.⁸⁶

⁸⁵ *Wheaton v. Insurance Co.*, 76 Cal. 415, 18 Pac. 758, 9 Am. St. Rep. 216; *Banco de Sonora v. Bankers' Mut. Casualty Co.* (Iowa) 95 N. W. 232; *Freedman v. Insurance Co.*, 175 Pa. 350, 34 Atl. 730. See also, *Briggs v. Insurance Co.*, 65 Mich. 52, 31 N. W. 616; *JOHNSON v. AMERICAN INS. CO.*, 41 Minn. 390, 43 N. W. 59.

⁸⁶ *Hayes v. Insurance Co.*, 132 N. C. 702, 44 S. E. 404, 95 Am. St. Rep. 627; *Keet-Rountree Dry Goods Co. v. Mercantile Town Mut. Ins. Co.*, 100 Mo. App. 504, 74 S. W. 469; *Gibson Electric Co. v. Liverpool & London & Globe Ins. Co.*, 159 N. Y. 418, 54 N. E. 23; *Kiernan v. Insurance Co.*, 150 N. Y. 190, 44 N. E. 698.

WHAT MAY BE WAIVED.

127. Either party may waive any condition of the contract insuring to his sole benefit, or any right which he may have with reference thereto,
EXCEPT when the public welfare requires the maintenance of the right sought to be waived, such as is given by a positive rule of common law or of statute. Agreements to waive such rights are of no effect.
128. While there is some authority to the contrary, it is well settled that the by-laws and regulations of a mutual company may be waived by its officers as fully as can any other terms of the insurer's contract.

As a general rule, any person may waive any right that distinctively belongs to him. So either party to a life insurance contract may waive any right or privilege of whatsoever character that he may take under the contract, provided that right or privilege is distinctively his own. As has already been readily inferred, the questions of waiver usually presented to the courts in connection with insurance contracts are those affecting waivers by the insurer, and usually concern those conditions of the contract that operate to give special rights or privileges to the insurer, such as the conditions that entitle the insurer to consider the policy void in case the insured violates any of the numerous conditions specified in the policy.

Conditions Against Waiver.

The validity of the condition found in the ordinary life policy forbidding waivers of any terms of the contract by any of the representatives of the company, save in some specified manner—usually by writing indorsed on the policy—has already been fully discussed in the preceding chapter, but, for purposes of completeness, the conclusions reached may properly be summarily repeated here. Such a condition is manifestly for the sole benefit of the insurer, and he may waive that condition if he sees fit, as well as any other of the policy.⁸⁷ It is clear that, if any representative of the company has authority to make such a condition against waivers, he must also have authority to unmake or waive it.⁸⁸ In such a case the terms of the condition waived can have no

⁸⁷ *City Planing & Shingle Mill Co. v. Merchants', Manufacturers' & Citizens' Mut. Fire Ins. Co.*, 72 Mich. 654, 40 N. W. 777, 16 Am. St. Rep. 552; *German Ins. Co. v. Gibson*, 53 Ark. 494, 14 S. W. 672; *Billings v. Insurance Co.*, 34 Neb. 502, 52 N. W. 397; *Corson v. Insurance Co.*, 113 Iowa, 641, 85 N. W. 806; *Tillis v. Insurance Co.* (Fla.) 35 South. 171.

⁸⁸ Thus a general agent having general power to make contracts on behalf of the company has apparent power to waive forfeitures, despite a term of the contract limiting that power to certain specified officers. *Aetna Life Ins. Co. v. Fallow* (Tenn.) 77 S. W. 937; *Indian River State Bank v. Hartford Fire Ins. Co.* (Fla.) 35 South. 228.

effect upon the validity of the waiver. These conditions forbidding waiver operate, therefore, merely as notice to the insured of limitations placed by the insurer upon the powers of the agent under the policy. The insured, after the receipt of the policy, must be deemed to have knowledge of the limitation; and, if that limitation upon the authority of the agent be true in fact, and be kept true, any attempt by the agent to make a subsequent waiver by any act in excess of his powers as thus limited will necessarily be inoperative.⁸⁰ But as heretofore observed, if the insurer has in fact permitted parol waivers by an agent, the condition in the policy denying to the agent the power to make waivers, except in writing, being untrue, will be nugatory.⁸⁰

This condition against waivers, being thus seen to be operative only as a notice to the insured, cannot, in the nature of things, in any wise affect the powers of the agent with regard to transactions prior to the delivery of the policy. As to such transactions, the agent will be deemed to have such powers as the insurer has allowed him to appear to possess; that is, powers coextensive with the business intrusted to him. In accordance with this principle, it is held by the great weight of authority that conditions in the policy prohibiting waivers by the agents of the company have no application to transactions relating to the inception of the policy.⁸¹

⁸⁰ WILKINS v. INSURANCE CO., 43 Minn. 177, 45 N. W. 1, Woodruff, Ins. Cas. 515; Walsh v. Insurance Co., 73 N. Y. 5; MESSELBACK v. NORMAN, 122 N. Y. 578, 26 N. E. 34, Richards, Ins. Cas. 397; KNICKERBOCKER LIFE INS. CO. v. NORTON, 96 U. S. 234, 24 L. Ed. 689, Richards, Ins. Cas. 399, Elliott, Ins. Cas. 52; KYTE v. ASSURANCE CO., 144 Mass. 43, 10 N. E. 518, Woodruff, Ins. Cas. 477.

Some courts hold that a condition prohibiting waivers by any representative of the company, save in writing, is repugnant, and therefore void in toto, while the restriction of that power to certain designated officers will operate as a valid limitation upon the power of other agents to grant waivers. Compare LAMBERTON v. INSURANCE CO., 39 Minn. 129, 39 N. W. 76, 1 L. R. A. 222, and WILKINS v. INSURANCE CO., supra. In Renier v. Insurance Co., 74 Wis. 89, 42 N. W. 208, it was held that a condition that no waiver should be valid, unless "in writing, signed by the president or secretary of the company," was ineffectual, as being unreasonable and repugnant, especially in the case of insurance by a foreign company. See, also, Westchester Fire Ins. Co. v. Earle, 33 Mich. 143; Eastern Ry. Co. v. Relief Fire Ins. Co., 105 Mass. 570.

⁸⁰ Knickerbocker Life Ins. Co. v. Norton, 96 U. S. 234, 24 L. Ed. 689, Richards, Ins. Cas. 399, Elliott, Ins. Cas. 52. And see cases cited in note 22, supra.

⁸¹ "The restrictions inserted in the contract upon the power of the agent to waive any condition, unless done in a particular manner, cannot be deemed to apply to those conditions which relate to the inception of the contract, when it appears that the agent has delivered it and received the premium with full knowledge of the actual situation. To take the benefit of a contract, with full knowledge of all the facts, and attempt afterwards to defeat it, when called upon to perform, by asserting conditions relating to those facts, would be to claim that no contract was made, and thus operate as a fraud upon the other

Rights in Which Public is Concerned cannot be Waived.

But it follows, as a correlative proposition to that stated above, that a party to a contract of insurance cannot waive any right therein which does not belong solely to himself. If the public is concerned in the maintenance of that right, he will not be allowed to waive it to the prejudice of the public. Such rights involving a public interest are usually statutory, being derived from those statutes that have been enacted for the purpose of protecting the public against the fraudu-

party." WOOD v. INSURANCE CO., 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733.

That the court considered itself full-handed with reasons for this holding is apparent from the opinion rendered in Robbins v. Insurance Co., 149 N. Y. 477, 44 N. E. 159: "The rule that an insurance company will not be permitted to defeat a recovery upon a policy issued by it by proving the existence of facts which would render it void, where it had full knowledge of them when the policy was issued, is too well established by the authorities in this state to require further discussion. It is manifest that the facts in this case bring it clearly within the principle of the cases cited. Whether the decisions of this class of cases proceed upon the charitable theory that the insurance company by mistake omitted to make the required indorsement, or intended to waive the provision regarding it, or upon the idea that its purpose was to defraud the insured, and is for that reason estopped, is of but little consequence, as any one of those theories is sufficient to avoid the defense relied upon in this case."

To the same effect, see Medley v. Insurance Co. (W. Va.) 47 S. E. 101; Virginia Fire & Marine Ins. Co. v. Richmond Mica Co. (Va.) 46 S. E. 463; Dowling v. Insurance Co., 163 Pa. 234, 31 Atl. 1087.

Contra, see RYAN v. INSURANCE CO., 41 Conn. 168, 19 Am. Rep. 490, Richards, Ins. Cas. 408, approved in NEW YORK LIFE INS. CO. v. FLETCHER, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934. There, however, the limitation was contained in the application, and not in the policy merely. But Northern Assur. Co. v. Grand View Bldg. Ass'n, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, seems to be squarely opposed to the prevailing view as stated in the text.

It is also held by many authorities that this limitation upon the power of agents to waive forfeitures "refers to the conditions which go to the making of the contract of insurance, and not to provisions relating to the proofs of loss which are to be performed in the event of a loss, and consequently this stipulation does not operate to prevent the company from making a waiver of proof of loss by conduct or otherwise than by express agreement." Farmers' Fire Ins. Co. v. Baker, 94 Md. 545, 51 Atl. 184; O'Leary v. Insurance Co., 100 Iowa, 390, 69 N. W. 686; Citizens' Ins. Co. v. Stoddard, 197 Ill. 330, 64 N. E. 355; Indian River State Bank v. Hartford Fire Ins. Co. (Fla.) 35 South. 228, 246. Probably a more correct statement of the principle involved in these cases (in which the alleged waiver was by absolute denial of liability by an agent authorized to make such denial, always held to dispense with the necessity of giving proofs of loss) is that no limitation or term of a contract can do away with the doctrine of estoppel. Any attempt expressly to waive a condition operating after loss would be subject to the limitation contained in the policy upon the agent's authority; but, if the company's conduct is such as to work an estoppel in fact, its condition will not be aided by a term in the policy denying its liability to be estopped.

lent and oppressive conduct of insurance companies. Thus, where a statute provides that no policy shall become forfeited for nonpayment of the premium unless notice of a specified kind is given by the insurer of default in payment, the insured cannot waive his right to receive such notice.⁹² So of those statutes requiring the insurer to pay the full amount set forth in his policy in case of total loss; any agreement in the policy that the amount recovered shall be limited to the actual value of the property destroyed, or to three-fourths of such value, will not operate to preclude the insured from claiming the full benefit of the statute.⁹³

There are certain common-law rights, also, which are so deeply embedded in public policy that a waiver of them will not be tolerated. Thus it is contrary to public policy that wagering insurance shall be written. The insurer therefore will not be allowed to waive his right to set up the defense of a lack of insurable interest.⁹⁴ Neither will the insurer be allowed to waive his right to hold the policy void in case the insured comes to his death by the execution of a legal judgment.⁹⁵ Nor when, by some authorities, the insured has died by his sane act of self-destruction.⁹⁶

Again, while rights may be waived, facts, which are known to be stubborn things, cannot be waived. Therefore the agreement by the insured, set forth in the policy, that the person who is really the agent of the insurer shall be, instead, the agent of the insured, cannot, on sound principle, operate as a waiver of the right of the insured to rely upon the truth of the matter, which is that the agent is, under facts of the case, the representative of the insurer.⁹⁷ Neither, by the better authority, can the insured waive the consequence of the operation of a settled rule of law by agreeing that the insurance company shall not be charged with knowledge of the facts known or fraud perpetrated by its representatives.⁹⁸

⁹² *Baxter v. Insurance Co.*, 119 N. Y. 450, 23 N. E. 1048, 7 L. R. A. 293. And see *Rosenplanter v. Society*, 96 Fed. 721, 37 C. C. A. 566, 46 L. R. A. 473.

⁹³ *Pennsylvania Fire Ins. Co. v. Drackett*, 63 Ohio St. 41, 57 N. E. 962, 18 Am. St. Rep. 608; *Reilly v. Insurance Co.*, 43 Wis. 449, 28 Am. Rep. 552; *Hartford Fire Ins. Co. v. Bourbon County Court*, 72 S. W. 739, 24 Ky. Law Rep. 1850. The courts do not seem inclined to extend this rule to statutory provisions intended for the benefit of the insurer. See *Ellis v. Insurance Co.*, 113 Cal. 612, 45 Pac. 988, 54 Am. St. Rep. 373.

⁹⁴ *CLEMENT v. INSURANCE CO.*, 101 Tenn. 22, 46 S. W. 561, 42 L. R. A. 247, 70 Am. St. Rep. 650; *Anctil v. Insurance Co.* [1899] App. Cas. 609.

⁹⁵ *Burt v. Insurance Co.*, 187 U. S. 362, 23 Sup. Ct. 139, 47 L. Ed. 216.

⁹⁶ *RITTER v. INSURANCE CO.*, 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693.

⁹⁷ *Sternaman v. Insurance Co.*, 170 N. Y. 13, 62 N. E. 763, 57 L. R. A. 318, 88 Am. St. Rep. 625; *KAUSAL v. INSURANCE CO.*, 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776, *Richards, Ins. Cas.* 392, *Woodruff, Ins. Cas.* 517.

⁹⁸ *Parno v. Insurance Co.*, 114 Iowa, 132, 86 N. W. 210; *Indian River State*

Regulations of Mutual Companies.

It is held by the Massachusetts decisions,⁹⁹ and perhaps in other states, that the by-laws and regulations of a mutual company cannot be waived by its officers, inasmuch as all persons becoming members of such an association are charged with knowledge of its regulations, and therefore of these implied limitations upon the powers of its representatives. This view, however, is rejected, and properly so, by the great weight of authority in this country.¹⁰⁰ Until the issue of a certificate by which the recipient is made a member of the association, he is a total stranger to it and its regulations, and should not be charged with a knowledge of its by-laws and rules any more than would any other stranger.

Conditions of the Standard Policy.

There has been some question whether the terms of a contract prescribed by law, as the standard form of fire policy in New York, could be waived. Probably an express waiver of any term, though in writing, would be invalid, as changing the prescribed form, but it is now well settled that an implied waiver or estoppel can be shown as readily under the standard policy as in other cases.¹⁰¹

Bank v. Hartford Fire Ins. Co. (Fla.) 35 South. 228. But see *NEW YORK LIFE INS. CO. v. FLETCHER*, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934.

⁹⁹ *McCoy v. Insurance Co.*, 133 Mass. 85; *Mulrey v. Insurance Co.*, 4 Allen (Mass.) 116, 81 Am. Dec. 689. And see *Pitney v. Insurance Co.*, 65 N. Y. 21.

¹⁰⁰ *Pratt v. Insurance Co.*, 130 N. Y. 206, 29 N. E. 117; *Susquehanna Mut. Fire Ins. Co. v. Elkins*, 124 Pa. 484, 17 Atl. 24, 10 Am. St. Rep. 608; *Railway Passenger & Freight Conductors' Mutual Aid & Benefit Ass'n v. Tucker*, 157 Ill. 194, 42 N. E. 398, 44 N. E. 286; *Towle v. Insurance Co.*, 91 Mich. 219, 51 N. W. 987; *KAUSAL v. INSURANCE CO.*, 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776, *Richards, Ins. Cas.* 392, *Woodruff, Ins. Cas.* 517.

¹⁰¹ See this question fully discussed in *Moore v. Insurance Co.*, 141 N. Y. 219, 36 N. E. 191; *Quinlan v. Insurance Co.*, 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645; *Skinner v. Norman*, 165 N. Y. 565, 59 N. E. 309, 80 Am. St. Rep. 776; and *WOOD v. INSURANCE CO.*, 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733. As to the Massachusetts standard policy, see *Parker v. Insurance Co.*, 162 Mass. 479, 39 N. E. 179. For a discussion of the Wisconsin cases, see *Welch v. Fire Ass'n* (Wis. 1904) 98 N. W. 227.

VANCE INS.—25

CHAPTER XI.

RIGHTS UNDER THE POLICY.

- 129. In General.
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- 132-134. Vested Rights of the Beneficiary.
- 135. Contingent Interest of the Beneficiary.
- 136. Mere Expectancy of Benefit.
- 137-138. Beneficiaries in Mutual Benefit Associations.
- 139. The Rights of Creditors of the Insured—Fire Policies.
- 140. Life Policy Payable to Insured.
- 141. Policy Payable to a Third Person.
- 142. When the Creditor Is the Assured.
- 143-145. The Rights of the Assignee.
- 146-147. Rights of the Mortgagor and Mortgagee.
- 148. Rights of Life Tenant and Remainderman.
- 149-150. Subrogation.

IN GENERAL.

129. As in the case of any other contract, the rights arising out of the contract of insurance, whether of the immediate parties or of others claiming through them, are to be determined by the terms of the contract itself, as soundly and reasonably construed.

When the right to demand of the insurer the payment of money has, under the terms of the policy, become fixed by reason of the happening of the contingency insured against, many contests may arise as to who shall be entitled to receive the money when paid. In the case of life insurance the creditors of the deceased may contend with his surviving wife and children, or with other designated beneficiaries, or the creditors of an insolvent insured may claim such portion of the proceeds of a policy made payable to a named beneficiary as will make good the sum diverted from the payment of debts to the payment of premiums. If the insurance be of property, a mortgagee may claim the proceeds of a policy to satisfy an incumbrance upon the property damaged or destroyed, or a vendee of property destroyed before conveyance may claim the insurance money paid to the vendor. These, and other questions involving rights under the insurance contract, must necessarily be determined in accordance with the terms of the contract itself. A reasonable and sound construction of the policy is, however, necessary to a correct solution of such questions, due regard being had to the nature of the contract, its purpose, and the intention of the parties as discoverable in the terms of the contract. All of the rules

presently to be stated in detail are but amplifications of this general rule as given above.

Life policies may provide that, upon maturity, the proceeds shall be payable to the insured or his personal representatives, or to some person or persons designated as beneficiaries of the insurance. The person designated thus as beneficiary may stand in any one of several relations to the person whose life is insured. The rights of such beneficiaries (sometimes termed the "assured") in all of these relations will now be considered.

THE BENEFICIARY.

130. The beneficiary is the person designated by the terms of the contract as the one to receive the proceeds of the insurance. Such beneficiary may be
- (a) A person insured or his personal representative.
 - (b) Some one other than the insured, who may be
 - (1) The assured, or the one procuring and maintaining the contract.
 - (2) One whom the insured, for a valuable consideration, has designated as beneficiary, or
 - (3) One whose nomination as beneficiary is due to mere bounty of the insured.
- The term as ordinarily used includes only third persons designated by the party insured as beneficiaries.
131. The rights of beneficiaries vary greatly with the terms of differing contracts. They may be
- (a) Vested
 - (1) Absolutely and indefeasibly, or
 - (2) Conditionally, subject to being divested by the happening of some condition subsequent.
 - (b) Contingent upon the happening of some condition precedent.
 - (c) Mere expectancies or possibilities of benefits to be received.

In insurance law the term "beneficiary" is ordinarily used to indicate only those persons who, though not parties to the contract, are mentioned in it as the recipients of the proceeds of the insurance. Such a restricted significance thus attached to the term merely points to the fact that most of the litigation involving such questions concerns rights claimed by such third persons as beneficiaries. A broader use of the term would include also those who, upon a proper basis of insurable interest, secure insurance for their own benefit upon the lives of others. Fortunately, the rights of this latter class of beneficiaries are not complex, and seldom give rise to questions of difficulty.

Insurance for the Benefit of the Insured or His Personal Representatives.

Policies are frequently made payable to the insured if he survives a specified endowment period, and to his estate, or to his personal rep-

representatives upon his death prior to the expiration of that period. In such cases the policy is a chose in action, which the insured may dispose of, assign, or encumber as he sees fit, and which can be seized on execution or assigned in bankruptcy, provided it has by its terms a cash surrender value. Otherwise, it is not liable to seizure for payment of debts, even though it may have a reserve value on the books of the company, or even though the insurer, of his own motion, may be willing to pay cash for its surrender.¹

A policy by its terms payable to the "estate" of the insured can be collected by his personal representatives; likewise if it is payable to his "legal representatives,"² although it is held in some jurisdictions that the phrase is to be construed as meaning heirs³ or next of kin. So a policy made payable to the "heirs" of the insured requires payment to such of his relations as would be his heirs or distributees if he had died intestate and not to his personal representatives.⁴

Policies payable to the insured or his estate, however, cause relatively little litigation, which more frequently arises in connection with those policies that by their terms are payable to some other person than the one whose life is insured. Such other person may occupy one of three relations toward the insured:

(1) He may himself be the person who procures the contract and pays the premium necessary to maintain it. Such a person is thus an immediate party to the contract, and is ordinarily called the "assured."

(2) The third person named as beneficiary may have paid a valuable consideration for his selection as such; that is, the insured may have taken out the policy for the benefit of a creditor or to secure some other obligation.

(3) The beneficiary may be one who gives no consideration whatsoever for any rights that may be acquired in the policy, but is designated as recipient of the proceeds of the policy through mere bounty of the insured.

The Assured as Beneficiary.

The rights of the assured as a party to the contract are, of course, definitely fixed by the terms of that contract, and cannot in any wise be changed or affected by the acts of the insured, unless such acts amount to a breach of some term or condition of the policy. The rights

¹ *Phoenix Mut. Life Ins. Co. v. Oppen*, 75 Conn. 295, 53 Atl. 586. See *infra*, p. 405.

² *Alford v. Insurance Co.*, 88 Minn. 478, 93 N. W. 517.

³ *Leonard v. Harney*, 63 App. Div. 294, 71 N. Y. Supp. 546, reversed in 173 N. Y. 352, 66 N. E. 3.

⁴ *Mullen v. Reed*, 64 Conn. 240, 29 Atl. 478, 24 L. R. A. 664, 42 Am. St. Rep. 174; *Lyons v. Yerex*, 100 Mich. 214, 58 N. W. 1112, 43 Am. St. Rep. 452; *Phillips v. Carpenter*, 79 Iowa, 600, 44 N. W. 898.

Contra, see *in re Duncombe's Estate*, 3 Ont. Law Rep. 510.

of such an assured are ordinarily mere choses in action, which may be freely assigned by him or seized in satisfaction of any debts that he may owe, provided they possess a determinable money value. The only serious difficulty that arises in determining the rights of the assured occurs in cases in which the policy has been taken out to secure a debt owed by the insured to the assured. Whether, after payment of the debt, the insured or his personal representative has any rights in the policy, is a difficult question, which will be reserved for discussion in a later section.⁵

Third Persons as Beneficiaries.

An immense mass of case-law has grown up in the process of determining the rights of third persons, not parties to the contract, who have been designated as beneficiaries. Before making the statement in detail of the several rules that have been established by the courts, it is well to observe generally that, although the position of the beneficiary is peculiar in contract law, it is yet subject in its determination to all the rules governing the construction of ordinary contracts. Contracts of life insurance are of almost infinite variety in their terms. These terms fix the rights of the beneficiary, but in their construction all the terms must be taken together in the attempt to discover the intention of the parties, and they must also be construed with reference to the general purposes of the insurance contract. Considering the terms of these widely differing contracts, it will be observed that they fall into three general classes with reference to the relation which such a beneficiary occupies toward the immediate contracting parties:

(1) The rights of the beneficiary may be vested absolutely or conditionally in accordance with the terms of the policy.

(2) Those rights may be contingent upon the happening of some event set forth in the policy, as a condition precedent to the acquisition of any rights by such beneficiary under the provisions of the contract.

(3) The person designated as beneficiary may be given no rights such as have the quality of property; that is, he may be designated as the one to whom there is an expectancy or bare possibility of benefit to accrue upon the maturity of the policy.

The rights of these several classes of beneficiaries will now be considered in detail.

⁵ See *infra*, § 142.

VESTED RIGHTS OF THE BENEFICIARY.

- 132. IN GENERAL**—When the policy provides that the proceeds shall be payable to a certain designated person, subject to no condition precedent, the law regards the title of the policy as vested in such person immediately upon its valid issue, even though it may remain in the possession of the insured.
- 133. RIGHTS ABSOLUTELY VESTED**—Where the title vests in the beneficiary without any condition of defeasance, the rights of the beneficiary become absolute, and by the weight of authority are characterized by all of the attributes of property. They may not be defeated by any act of the insured or of the insurer, or in any other way without the consent of the beneficiary. They may be transferred and assigned by the beneficiary, and are subject to the payment of his debts as are any other choses in action. This is equally true whether the beneficiary has given a consideration for such rights or not.
- 134. RIGHTS CONDITIONALLY VESTED**—By the terms of the policy the rights of the beneficiary, as thus vested, may be subject to be defeated by the happening of some condition subsequent, as of death before the insured. While such rights are necessarily defeated by the happening of the condition specified, they cannot be destroyed in any other manner without the consent of the beneficiary.

Rights of Unconditional Beneficiary.

It is well settled by the courts of all English speaking states, with the solitary exception of Wisconsin,⁶ that the rights of the person absolutely designated as the recipient of the moneys to be paid under a contract of life insurance are vested, and indefeasible without the consent of that beneficiary.⁷ It must, of course, be borne in mind that the right of the beneficiary is only to receive moneys that shall become

⁶ *Clark v. Durand*, 12 Wis. 223; *FOSTER v. GILE*, 50 Wis. 603, 7 N. W. 555, 8 N. W. 217; *Estate of Breitung*, 78 Wis. 33, 46 N. W. 891, 47 N. W. 17; *Ellison v. Straw*, 116 Wis. 207, 92 N. W. 1094.

The case of *Rison v. Wilkerson*, 3 Sneed. (Tenn.) 565, is sometimes cited as opposed to the general doctrine. The insurance in that case was payable to the insured, and not to any third person, and the decision is sound. See *Pratt v. Insurance Co. (Tenn.)* 17 S. W. 352.

⁷ *Central Nat. Bank v. Hume*, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370; *Griffith v. Insurance Co.*, 101 Cal. 639, 36 Pac. 117, 40 Am. St. Rep. 101; *Hendrie & Bolthoff Mfg. Co. v. Platt*, 13 Colo. App. 15, 56 Pac. 211; *Harley v. Heist*, 86 Ind. 196, 45 Am. Rep. 285; *Glanz v. Gloeckler*, 104 Ill. 573, 44 Am. Rep. 94; *Wirgman v. Miller*, 98 Ky. 624, 33 S. W. 937; *Pingrey v. Insurance Co.*, 144 Mass. 374, 11 N. E. 562; *Shipman v. Home Circle*, 174 N. Y. 398, 67 N. E. 85, 63 L. R. A. 347; *Holmes v. Gilman*, 138 N. Y. 382, 34 N. E. 205, 20 L. R. A. 566, 34 Am. St. Rep. 463; *Hooker v. Sugg*, 102 N. C. 115, 8 S. E. 919, 3 L. R. A. 217, 11 Am. St. Rep. 717; *Washington Life Ins. Co. v. Berwald (Tex. Sup.)* 76 S. W. 442; *Preston v. Insurance Co.*, 95 Md. 101, 51 Atl. 838.

due in accordance with the terms of the policy. Therefore, it follows that any act or default on the part of the insured, which by the terms of the policy will defeat it, will also prevent the rights of the beneficiary, vested under the policy, from becoming effective. It is the right of the beneficiary that is vested, and not the receipt of the money under the policy that is assured. Thus, if the insured travels in latitudes prohibited by the policy, or if he takes his own life contrary to a stipulation in the policy, the vested right of the beneficiary will be rendered nugatory.⁸ So, a default in the payment of the premiums by the insured will defeat the policy and deprive the beneficiary of any benefit thereunder. The beneficiary is, however, entitled to prevent a default in the payment of premiums by himself paying or tendering such premiums,⁹ but he is not entitled to notice of the time when premiums fall due,¹⁰ unless the insured himself is entitled to such notice.

Statutory Provisions.

In many states of the Union, statutes have been passed providing that when a policy is issued upon the life of a husband, payable to his wife or to his wife and children, whether the policy be procured by the wife herself or the husband or by some third party, the rights of the wife and children shall be deemed vested, and the money reserved to them under the policy will come to them free from the debts of the husband. Such statutes, however, usually merely declare in part the more extended rule of the common law as above stated.¹¹

Donee Beneficiaries within General Rule.

In some of the earlier cases it is stated that, if the beneficiary has given no consideration for the appointment, a delivery of the policy to the beneficiary, or to some one on his behalf, will be necessary in order to complete his right to the proceeds of the policy.¹² But the later decisions have established beyond question the rule that the title to the policy vests absolutely in the beneficiary immediately upon its

⁸ *McCoy v. Relief Ass'n*, 92 Wis. 577, 66 N. W. 697, 47 L. R. A. 681. See, also, *Behling v. Insurance Co.*, 117 Wis. 24, 93 N. W. 800.

⁹ *Mutual Life Ins. Co. v. Hill*, 178 U. S. 347, 20 Sup. Ct. 914, 44 L. Ed. 1097; *Pingrey v. Insurance Co.*, 144 Mass. 374, 11 N. E. 562. This is true even when the beneficiary is such only as voluntary assignee. *McGlynn v. Curry*, 82 App. Div. 431, 81 N. Y. Supp. 855.

¹⁰ *Union Cent. Life Ins. Co. v. Buxer*, 62 Ohio St. 385, 57 N. E. 66, 49 L. R. A. 737. See, also, *Rowe v. Insurance Co.*, 16 Misc. Rep. 323, 38 N. Y. Supp. 621, as to assured's right of notice under the New York statute.

¹¹ It is sometimes intimated that the rule giving the absolute beneficiary a vested right in the policy had its origin in these statutes. *Washington Life Ins. Co. v. Berwald (Tex. Sup.)* 76 S. W. 442. See, also, 3 Am. & Eng. Enc. Law, 981. But such can hardly be the case. In North Carolina a similar provision is incorporated in the state constitution. See *Burwell v. Snow*, 107 N. C. 82, 11 S. E. 1090.

¹² See *LEMON v. INSURANCE CO.*, 38 Conn. 294.

issue, even though it may not come into the hands of the beneficiary.¹³ The best statement of this general rule under discussion is probably found in the often quoted opinion of Chief Justice Fuller in *Central Nat. Bank v. Hume*,¹⁴ in which he says: "It is, indeed, the general rule that a policy, and the money to become due under it, belong, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance, by any act of his, by deed, or by will, to transfer to any other person the interest of the person named."

The vested rights of the beneficiary will not be defeated by the suicide of the insured, unless the policy expressly so provides,¹⁵ nor will the divorce of a wife named as beneficiary in a policy procured by her husband divest her rights.¹⁶

Effect of Murder of Insured by Beneficiary.

It is a well-settled principle applying to all contracts of insurance that no person insured shall under his contract receive indemnity for a loss that he himself has intentionally brought about. Thus, it is held that a person who burns his own house may not recover under a contract of insurance upon that house, even though no such exception exists in the contract.¹⁷ In like manner it has been frequently held that, where the beneficiary procures the death of the insured under such circumstances as to amount to a felony, he can receive no benefit under the contract of insurance.¹⁸ In *Cleaver v. Reserve Life Ass'n*¹⁹ (arising out of the famous Maybrick Case) it was held that the wife, who poisoned her husband, could not make claim to the money payable under the insurance policy upon his life.

If, however, the death of the insured was caused under such circumstances as do not amount to felony, as where the beneficiary was insane, the rights of the beneficiary under the policy are not affected.²⁰

¹³ *Holmes v. Gilman*, 138 N. Y. 382, 34 N. E. 205, 20 L. R. A. 566, 34 Am. St. Rep. 463; *Whitehead v. Insurance Co.*, 102 N. Y. 143, 6 N. E. 267, 55 Am. Rep. 787; *Laughlin v. Norcross*, 97 Me. 33, 53 Atl. 834.

¹⁴ 128 U. S. 195, 206, 9 Sup. Ct. 41, 44, 32 L. Ed. 370.

¹⁵ *Mutual Life Ins. Co. v. Terry*, 15 Wall. 580, 21 L. Ed. 236; *Darrow v. Fund Soc.*, 116 N. Y. 537, 22 N. E. 1093, 6 L. R. A. 495, 15 Am. St. Rep. 430; *Fitch v. Insurance Co.*, 59 N. Y. 557, 17 Am. Rep. 372; *Morris v. Assurance Co.*, 183 Pa. 563, 39 Atl. 52; *SEILER v. LIFE ASS'N*, 105 Iowa, 87, 74 N. W. 941, 43 L. R. A. 537.

See, further, "Suicide," post, p. 516.

¹⁶ *Overhiser's Adm'x v. Overhiser*, 63 Ohio St. 77, 57 N. E. 965, 50 L. R. A. 552, 81 Am. St. Rep. 612.

¹⁷ *Karow v. Insurance Co.*, 57 Wis. 56, 15 N. W. 27, 46 Am. Rep. 17.

¹⁸ *New York Mut. Life Ins. v. Armstrong*, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997; *Schmidt v. Life Ass'n*, 112 Iowa, 41, 83 N. W. 800, 51 L. R. A. 141, 84 Am. St. Rep. 323.

¹⁹ [1892] 1 Q. B. 147.

²⁰ *Holdom v. Ancient Order*, 159 Ill. 619, 43 N. E. 772, 31 L. R. A. 67, 50 Am. St. Rep. 183.

The rule prohibiting the beneficiary from taking any rights under a policy that has been matured by the murder of the insured is not based upon the doctrine of fraud, for it has been held that the murderous beneficiary forfeits all rights under the policy, even though it be proved that the hope of obtaining money under the policy was not the motive of the murder.²¹ But while the felonious act of the beneficiary will defeat his rights under the policy, it seems that it will not serve as a defense to the insurer, who must pay the amount of the insurance to the representatives of the insured, to whom the property in the policy is deemed to revert. Such is certainly the rule where the right to change the beneficiary is reserved in the policy.²²

The Theory of the Rule.

The rights thus accorded by the practically unanimous decisions of the courts to the beneficiary in an insurance policy, including the right to bring in his own name an action at law on the contract, are unique in the law of contracts. It is not easy to discover in all cases the theory upon which the courts place the beneficiary in so much more advantageous a position than that occupied by the person for whose benefit an ordinary contract is made. It seems, however, that three different views as to the nature of the beneficiary's right in the insurance policy have been adopted by the different courts:

(1) It has been held that the designation of the beneficiary is in its nature a declaration of trust, which must be held sacred from interference or destruction by the parties to the contract.²³

(2) Other courts have considered the beneficiary as a party to the contract made on his behalf by the insured.²⁴ This view, making the insured, when procuring the policy, merely the agent of the beneficiary, and therefore without subsequent authority to affect the rights of his principal, affords an excellent basis for the rule that the beneficiary's rights are indefeasible, but unfortunately in most of the cases the view

²¹ *Schreiner v. High Court*, 35 Ill. App. 576.

²² *Schmidt v. Life Ass'n*, 112 Iowa, 41, 83 N. W. 800, 51 L. R. A. 141, 84 Am. St. Rep. 323; *Cleaver v. Reserve Life Ass'n* [1892] 1 Q. B. 147. See, also, in this connection, *Shea v. Benefit Ass'n*, 160 Mass. 289, 35 N. E. 855, 39 Am. St. Rep. 475.

²³ *Small v. Jose*, 86 Me. 120, 29 Atl. 976; *National Life Ins. Co. v. Haley*, 78 Me. 268, 4 Atl. 415, 57 Am. Rep. 807; *RYAN v. ROTHWEILER*, 50 Ohio St. 595, 35 N. E. 681; *Woodruff's Cases*, 368; *Pingrey v. Insurance Co.*, 144 Mass. 374, 11 N. E. 562; *Ricker v. Insurance Co.*, 27 Minn. 193, 6 N. W. 771, 38 Am. Rep. 289.

²⁴ See *Washington Life Ins. Co. v. Berwald* (Tex. Sup.) 76 S. W. 442; *Thompson v. Insurance Co.*, 46 N. Y. 674; *Whitehead v. Insurance Co.*, 102 N. Y. 143, 6 N. E. 267, 55 Am. Rep. 787; *Holmes v. Gilman*, 138 N. Y. 382, 34 N. E. 205, 20 L. R. A. 566, 34 Am. St. Rep. 463.

The New York cases are powerfully affected by statute. See, also, *Millard v. Brayton*, 177 Mass. 533, 59 N. E. 436, 52 L. R. A. 117, 83 Am. St. Rep. 294.

is so contrary to fact that it will scarcely answer as a satisfactory theory.

(3) Another view, already referred to as taken by some of the earlier decisions, is that the policy, as a chose in action, becomes the property of the beneficiary when delivered to him as an executed gift.²⁶ This gift theory, however, will not avail, inasmuch as we have seen that no delivery to the beneficiary is necessary to fix his rights.

None of these theories satisfies the curious student. Neither can the vested character of the beneficiary's right be explained in accordance with the general rule that a third party for whose benefit a contract is made may enforce that contract, for it would seem that such a contract, upon the mutual agreement of the two principal parties, could be rescinded. Furthermore, the fact that in both England and Massachusetts the beneficiary is allowed to bring an action in his own right on the policy strikingly differentiates him from the beneficiary of an ordinary contract, who is accorded no such right in those jurisdictions. It seems better and more in accordance with the decisions to say that, under the special common-law rule that has grown up, the beneficiary takes a peculiar property right, which must be recognized in accordance with the rule above stated.²⁶

In construing the insurance contract for the purpose of determining who are entitled to benefits under it, the courts are strongly inclined to consider the designation of the beneficiary as analogous to a testamentary provision,²⁷ and therefore give the probable intention of the insured as full effect as possible. But this tendency seems in derogation of the well-established rule of law that the beneficiary takes a property right. Thus, it is held in many jurisdictions that, where a policy is made payable to several joint beneficiaries, the rights of one dying before the insured pass to the survivors among the beneficiaries, rather than to the deceased beneficiary's personal representatives.²⁸

²⁶ *LEMON v. INSURANCE CO.*, 38 Conn. 294.

²⁷ See discussion in *Ricker v. Insurance Co.*, 27 Minn. 193, 6 N. W. 771, 38 Am. Rep. 289; also, 6 Va. Law Reg. 366.

²⁸ *Duvall v. Goodson*, 79 Ky. 224. "But when considered with respect to the rights of those who claim to be beneficiaries—especially when they are the natural objects of the affection and bounty of the person procuring and paying for the insurance—should be regarded in the light of a testamentary provision, rather than of a contract." *Robinson v. Duvall*, 79 Ky. 83, 42 Am. Rep. 208.

²⁹ See *Robinson v. Duvall*, 79 Ky. 83, 42 Am. Rep. 208; *United States Trust Co. v. Mutual Ben. Life Ins. Co.*, 115 N. Y. 152, 21 N. E. 1025; *Walsh v. Insurance Co.*, 133 N. Y. 408, 31 N. E. 228, 28 Am. St. Rep. 651; *Continental Life Ins. Co. v. Webb*, 54 Ala. 688. But other courts hold that the shares of deceased beneficiaries, dying before the insured, pass to their personal representatives. See *In re Conrad's Estate*, 89 Iowa, 396, 56 N. W. 535, 48 Am. St. Rep. 396; *Hooker v. Sugg*, 102 N. C. 115, 8 S. E. 919, 3 L. R. A. 217, 11 Am. St. Rep. 717; *GLENN v. BURNS*, 100 Tenn. 295, 45 S. W. 784; *Woodruff's*

Such a holding is clearly due to the analogous rule obtaining when one of several joint legatees or devisees dies before the testator.²⁹

The Beneficiary's Right to Assign.

It is generally held that the beneficiary's right in the policy is of such a character that it may be assigned by him with or without the consent of the insured.³⁰ Likewise such rights are regarded as property, which is liable to be seized in satisfaction of debts and is subject to attachment, provided the policy has a cash surrender value, or is matured.³¹

When the Beneficiary Dies before the Insured.

There is much conflict as to the legal consequence of the death of the beneficiary before the maturity of the policy. In determining whether the right to receive the proceeds shall pass to the personal representative of the beneficiary, or shall revert to the estate of the insured, so as to enable him to appoint another beneficiary, there is a conflict between the theory that regards the policy as a mere chose in action, subject to the same rules of action which apply to any other chose, and that which regards it as in the nature of a testamentary provision. By the great weight of authority, the courts, in determining such cases, abide by the rule that the property in the policy, having vested absolutely in the beneficiary, must at his death pass to his personal representative, to be then disposed of in accordance with the laws of distribution of personal property.³² In other jurisdictions, however, it is held that the intention of the parties to the contract must be carried out as far as possi-

Cases, 372; *Andrus v. Association*, 168 Mo. 158, 67 S. W. 582, in which the beneficiaries' interest was only conditionally vested.

²⁹ *Lockhart v. Vandyke*, 97 Va. 356, 33 S. E. 613; *In re Moss* [1899] 2 Ch. Div. 314.

³⁰ *New York Mut. Life Ins. Co. v. Armstrong*, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997; *Hewlett v. Home for Incurables*, 74 Md. 350, 24 Atl. 324, 17 L. R. A. 445; *Wirgman v. Miller*, 98 Ky. 620, 33 S. W. 937. The beneficiary's agreement to release his interest amounts to an equitable assignment. *Cockrell v. Cockrell*, 79 Miss. 569, 31 South. 203. The New York statute requires the written consent of the insured husband. *Sherman v. Allison*, 77 App. Div. 49, 80 N. Y. Supp. 148. And see *Ellison v. Straw*, 116 Wis. 207, 92 N. W. 1094.

³¹ See *Amberg v. Insurance Co.*, 171 N. Y. 314, 63 N. E. 1111 (under New York statute); *Ellison v. Straw*, 116 Wis. 207, 92 N. W. 1094. But in some states the rights of a surviving widow in the proceeds of a policy payable to her are exempt by statute, as is also property purchased with such proceeds. See *Cook v. Allee*, 119 Iowa, 226, 93 N. W. 93.

³² *Block v. Insurance Co.*, 52 Ark. 201, 12 S. W. 477, 20 Am. St. Rep. 166; *Johnson v. Hall*, 55 Ark. 210, 17 S. W. 874; *Franklin Life Ins. Co. v. Galligan*, 71 Ark. 295, 73 S. W. 102; *Drake v. Stone*, 58 Ala. 133; *HARLEY v. HEIST*, 86 Ind. 196, 45 Am. Rep. 285; *Woodruff's Cases*, 362; *Phoenix Mut. Life Ins. Co. v. Dunham*, 46 Conn. 79, 33 Am. Rep. 14; *Hooker v. Sugg*, 102 N. C. 115, 8 S. E. 919, 3 L. R. A. 217, 11 Am. St. Rep. 717; *Swan v. Snow*, 11 Allen (Mass.) 224; *United States Trust Co. v. Mutual Ben. Life Ins. Co.*, 115 N. Y. 152, 21

ble. Since the insured cannot have intended to make a provision, at the cost of annual premiums paid by him, for the personal representatives or distributees of the beneficiary, who may have no claim upon his bounty or interest in his life, they hold that the right vested in the beneficiary reverts to the insured as a lapsed trust, thus enabling him to select another object for his bounty, or, in case no such new appointment be made, allowing the benefit of the insurance to pass to the estate of the insured.³³ This latter view has tended to interfere with the operation of the established rule as to the nature of the right of the beneficiary, thus needlessly complicating the law upon this already complicated subject, and is not to be commended. While it is true that the devolution of the beneficiary's rights under the policy to a stranger usually defeats the purposes of the policy, this is a result that can always be avoided by the insured by taking the precaution to have inserted in the contract a condition reserving to himself the right to change the beneficiary.³⁴ If he does not do this, it would seem reasonable and proper to require that the rules of law should operate to carry the deceased beneficiary's interest in the policy to his personal representatives.

Rights Vested Conditionally.

The beneficiary's rights in the policy may be vested, and yet, in accordance with the terms of the contract, be liable to be defeated by the happening of some condition subsequent. Such rights are analogous to vested future estates in realty that are subject to be divested.³⁵ It is frequently difficult to determine whether the condition imposed upon the beneficiary's rights under any given contract is precedent, making such rights contingent upon the happening of the condition, or whether

N. E. 1025 (under New York statute); *FOSTER v. GILE*, 50 Wis. 603, 7 N. W. 555, 8 N. W. 217.

The rule applies with especial force when the policy is payable to the beneficiary, "his executors, administrators, or assigns." See *Glanz v. Gloeckler*, 104 Ill. 573, 44 Am. Rep. 94; *Preston v. Insurance Co.*, 95 Md. 101, 51 Atl. 838.

It is obvious that, where the beneficiary has paid value for his appointment, his interest must pass, in case of his death before the insured, to his personal representatives.

³³ *RYAN v. ROTHWEILER*, 50 Ohio St. 595, 35 N. E. 679; *Shields v. Sharp*, 35 Mo. App. 178; *Mutual Ben. Life Ins. Co. v. Atwood's Adm'x*, 24 Grat. (Va.) 497, 18 Am. Rep. 652; *Kerman v. Howard*, 23 Wis. 108. In some cases it is held that the personal representatives of the predeceased beneficiary may claim the insurance, rather than those of the insured, in case the latter has failed to make a reappointment. *Continental Life Ins. Co. v. Palmer*, 42 Conn. 60, 19 Am. Rep. 530; *Walsh v. Insurance Co.*, 61 Hun, 91, 15 N. Y. Supp. 697.

³⁴ See *HARLEY v. HEIST*, 86 Ind. 196, 45 Am. Rep. 285; *Woodruff's Cases*, 362.

³⁵ *Roquemore v. Dent*, 135 Ala. 292, 33 South. 178, 93 Am. St. Rep. 33.

And see *Ellison v. Straw*, 116 Wis. 207, 92 N. W. 1094, under Wisconsin statute.

it is subsequent, merely divesting rights then vested.³⁶ Nor does it seem that the courts are inclined to favor the vesting of such rights, as in analogous cases in the law of real estate. The tendency seems to be to consider conditional rights contingent rather than vested.³⁷ This tendency is doubtless due to the inclination of the courts to consider the appointment of the beneficiary in the light of a testamentary disposition. The nature of conditional vested rights, and also the importance of the principle in practice, is well illustrated in the striking case of *United States Casualty Co. v. Kacer*,³⁸ recently decided in the Supreme Court of Missouri. The policy in question provided that upon the death of the insured a large sum should be paid to his daughter, "if living"; if not, to the personal representatives or assigns of the insured. The insured and his daughter, the beneficiary, perished by shipwreck in the Gulf of Mexico, there being no evidence whatever as to which survived the other. Under these circumstances a contest arose between the personal representative of the beneficiary and those of the insured, as to which was entitled to the receipt of the insurance moneys. It is manifest that if the right of the beneficiary was to be regarded as vested, subject to be divested upon her death before the insured, the burden would rest upon the representatives of the insured to prove his survivorship and the consequent divesting of the beneficiary's rights. On the other hand, if the expression "if surviving" should be regarded as a condition precedent to the vesting of any rights in the beneficiary, the burden would rest upon the representative of the beneficiary to prove the happening of that condition. The court, in a well written and thoroughly sound opinion, decided that the right of the beneficiary under the policy was vested, and could be defeated only by proof of the happening of the divesting condition of death before the insured.

The same person who perished in the disaster described above also had a benefit certificate in a mutual benefit association, likewise payable to his daughter. As will be seen later, it is with practical unanimity held that the beneficiary designated in a certificate of a mutual benefit association has not a vested right in the insurance. Hence, when the question arose between the representatives of father and daughter as to which should be entitled to the moneys under the benefit certificate, it was held in a Missouri court that the daughter's representative could take only upon proof of her surviving the insured,

³⁶ Compare *FOSTER v. GILE*, 50 Wis. 603, 7 N. W. 555, 8 N. W. 217, with *Fuller v. Linzee*, 135 Mass. 468.

³⁷ See *Fuller v. Linzee*, 135 Mass. 468.

³⁸ 169 Mo. 301, 69 S. W. 370, 58 L. R. A. 436, 92 Am. St. Rep. 641. See, also, *Cowman v. Rogers*, 73 Md. 403, 21 Atl. 64, 10 L. R. A. 550.

since that was a condition precedent to the vesting of her right.³⁹ So, in the Massachusetts case of *Fuller v. Linzee*,⁴⁰ the policy was made payable to the insured's wife or assigns, but, if she should die before the insured, it was to become payable to their children. The charter of the association which had issued the insurance stipulated that the insurance should be for the benefit of the wife if she should survive; otherwise for the children. Reading the provision of the policy in connection with that of the charter, the court held that the condition of survivorship was precedent, and therefore the rights of the wife contingent. Hence, when the insured, his wife and children, all perished in the same disaster, the court refused to allow the payment of the insurance money to the wife's personal representatives. As a general rule, however, it would seem that, where a policy is payable to a beneficiary "if surviving," such a beneficiary's rights should be regarded as conditionally vested.

CONTINGENT INTEREST OF THE BENEFICIARY.

- 135. The terms of the policy may designate some person as contingent recipient of the proceeds of the insurance, his right to take the fund being conditioned upon the happening of some prior event. Upon the happening of the contingency specified, the contingent right becomes vested and indefeasible; and, even while the right remains contingent, it is liable to destruction only in accordance with the terms of the policy.**

In the preceding section, reference has already been made to the importance of determining whether the rights of the beneficiary are contingent or vested. It is improbable that such contingent rights would be so far recognized as to permit their assignment prior to the happening of the contingency upon which they vested, or that they would be regarded as estates liable to satisfaction of the beneficiary's debts, although some courts hold them to be transmissible.⁴¹ The most frequently occurring and natural contingent provision in life insurance is found in those policies that are made payable to the insured's wife, but providing that, in case of her death before that of the insured, the insurance money shall be payable to their children. In those cases it is

³⁹ *Supreme Council Royal Arcanum v. Kacer*, 96 Mo. App. 93, 69 S. W. 671. See, also, declaring the same rule, *Males v. Sovereign Camp*, 30 Tex. Civ. App. 184, 70 S. W. 108, where both insured and beneficiary perished in the great Galveston storm; *Screwmen's Benev. Ass'n v. Whitridge*, 95 Tex. 539, 68 S. W. 501; *Hildenbrandt v. Ames*, 27 Tex. Civ. App. 377, 66 S. W. 131. But see, contra, *Cowman v. Rogers*, 73 Md. 403, 21 Atl. 64, 10 L. R. A. 550.

⁴⁰ 135 Mass. 468.

⁴¹ *Hooker v. Sugg*, 102 N. O. 115, 8 S. E. 919, 3 L. R. A. 217, 11 Am. St. Rep. 717; *In re Conrad's Estate*, 89 Iowa, 396, 56 N. W. 535, 48 Am. St. Rep. 396.

plain that during the life of the wife the children have a mere contingent interest in the insurance, which, however, vests upon the death of the wife during the life of the insured.⁴² It seems that the contingent right of the children in such policies cannot be defeated without their consent, and that, even though both the insured and vested beneficiary should agree to the surrender and cancellation of the policy,⁴³ it would, nevertheless, become payable to the contingent beneficiaries if their rights should become vested by the death of the wife.⁴⁴

MERE EXPECTANCY OF BENEFIT.

- 136. By the weight of authority the person designated as beneficiary in a policy, by the terms of which is reserved to the insured the privilege of changing the beneficiary at will, takes no property rights whatsoever in the policy, but a mere expectancy of benefit. This rule applies to beneficiaries named in certificates of mutual benefit associations, who may always be changed arbitrarily.**

As an original question, there would be reason for holding that, where there is reserved to the insured, either by the terms of the policy or by provisions of the charter or by-laws of the benefit association, the right to change the beneficiary at his own pleasure, the rights of such beneficiary should be regarded as vested until divested by the appointment of another as beneficiary.⁴⁵ Such, however, is not the conclusion reached by the courts. It seems rather to have been determined, with practically unanimity of decision, that the rights of a beneficiary under a contract allowing arbitrary change of the beneficiary have not in any sense the quality of property, but constitute in such beneficiary merely an expectancy of benefit to be received under the contract in case he happens to occupy the position of appointee at the time of the death of the insured.⁴⁶

⁴² *Chapin v. Fellowes*, 36 Conn. 132, 4 Am. Rep. 49; *Connecticut Mut. Life Ins. Co. v. Burroughs*, 34 Conn. 305, 91 Am. Dec. 725; *Ricker v. Insurance Co.*, 27 Minn. 193, 6 N. W. 771, 38 Am. Rep. 239.

Any other condition precedent to the beneficiary's right to demand payment will cause his interest to be contingent. See *Thomas v. Insurance Co.*, 158 Ind. 461, 63 N. E. 295.

⁴³ In New York the statute requires a different ruling. See *Anderson v. Goldsmidt*, 103 N. Y. 617, 9 N. E. 495.

⁴⁴ See *Brown's Appeal*, 125 Pa. 303, 17 Atl. 419, 11 Am. St. Rep. 900. See, also, *Entwistle v. Insurance Co.*, 202 Pa. 141, 51 Atl. 759; *Virgin v. Marwick*, 97 Me. 578, 55 Atl. 520.

⁴⁵ *Hopkins v. Hopkins*, 92 Ky. 327, 17 S. W. 864.

⁴⁶ *Hoeft v. Supreme Lodge*, 113 Cal. 91, 45 Pac. 185, 33 L. R. A. 174; *Leftwich v. Wells*, 101 Va. 255, 43 S. E. 364. But see *Jarvis v. Binkley* (Ill.) 69 N. E. 582, in which it is held that the beneficiaries under mutual benefit cer-

If it be true that the beneficiary under such a contract takes no property rights in the insurance, the inference is natural that the property in the contract remains in the insured, and would, therefore, be subject to attachment for debt or assignment in bankruptcy, in case it had any cash value. It is probable, however, that, when the question arises, the courts will decide that the right of the insured in such a policy is rather that of the donee of a general power of appointment, who may appoint to his creditors if he sees fit, but need not if he desires otherwise.⁴⁷

BENEFICIARIES IN MUTUAL BENEFIT ASSOCIATIONS.

137. The designation of the beneficiary in ordinary benefit certificates is held to have no contractual significance. Subject to the limitations set in the association's charter, constitution, and by-laws, the insured may arbitrarily change the beneficiary named in his certificate, even though the right to make such change is not reserved.

EXCEPT—(a) When the beneficiary has been designated in accordance with the terms of a binding contract, in which case the insured is estopped to exercise his right to change.

(b) When the contract is of such unusual form as to give the beneficiary a clearly vested right.

138. MODE OF CHANGE—The beneficiary can be changed only in the mode prescribed by the rules of the association. A clearly proved intention to make the change is not sufficient, if any of the formal requirements are lacking.

EXCEPT—(a) When the insured has done all in his power to comply with such requirements, equity will protect the rights of the intended beneficiary.

(b) When the association has waived any defects in an attempted change of beneficiaries, the original beneficiary cannot set up such a defect to defeat the change.

While it is generally held that mutual benefit associations engaged in making contracts of insurance with their members are to be regarded as insurance companies,⁴⁸ yet it is also generally recognized that the contracts of such associations differ somewhat in nature from those of

tificates had such interests as could be validly assigned in equity to creditors. See, also, *Pomeroy v. Insurance Co.*, 40 Ill. 398; *Supreme Council Royal Arcanum v. Tracy*, 169 Ill. 123, 48 N. E. 401.

⁴⁷ See *Leftwich v. Wells*, 101 Va. 255, 43 S. E. 364.

The same rule applies even when the certificate on its face is payable to the devisee of the insured. *Northwestern Masonic Aid Ass'n v. Jones*, 154 Pa. 99, 26 Atl. 253, 35 Am. St. Rep. 810.

⁴⁸ See ante, p. 58. But in some cases such societies have been held not to be insurance companies. *Commonwealth v. Equitable Ben. Ass'n*, 137 Pa. 412, 18 Atl. 1112; *Northwestern Masonic Aid Ass'n v. Jones*, 154 Pa. 99, 26 Atl. 253, 35 Am. St. Rep. 810.

regular life insurance companies. Their purpose is benevolent rather than money-making. Only members have the privilege of securing insurance, and membership can be acquired only upon complying with the specified requirements of the association. As a consequence of membership in such an association and the discharge of all of the duties assumed in reference to them, the member is entitled to certain contingent benefits. These benefits are intended to afford relief either to the member himself, or to those dependent upon him for support, against disabling accidents or death. The charter and by-laws of the associations usually set forth these purposes at length, and specify the classes of dependents who may receive benefits accruing from membership. While each member receiving a benefit certificate may designate the beneficiary in such certificate, he is limited in his choice to those classes of beneficiaries set forth in the laws of the association.

From this statement of the relation between the mutual association and its members, it is apparent that the contractual relation strikingly differs from that existing between the regular insurance companies and their policy holders. The contract of the association is solely with its member, and cannot in any view be regarded as being made with the beneficiary designated in the certificate.⁴⁹ Therefore, it is held with practical unanimity that the beneficiary takes no contract rights under the benefit certificate, and is subject to change at the will of the person taking out the certificate, even though the right to make such change is not expressly reserved in the laws of the association or by the terms of the certificate itself.⁵⁰

With the exception of the unusual cases noted below, it is well set-

⁴⁹ See *Sabin v. Phinney*, 134 N. Y. 423, 31 N. E. 1088, 30 Am. St. Rep. 681, in which the court said: "The statute under which the corporation was organized, its by-laws, together with the application for and the certificate of membership, constituted the contract which existed between the member and the society, which instruments, construed together, measure the rights of these litigants. Any person who became an appointee in such a certificate took the position subject to the absolute right of the member to substitute a new one at any moment. The rights acquired by the member by virtue of this relation did not amount to a chose in action. He had no interest in the society that was assignable or transferable until some right of action had accrued. The appointee had no vested interest in the sum which might, in a contingency, become payable on death of the member." See, also, *Keefer v. Modern Woodmen*, 203 Pa. 129, 52 Atl. 164; *Brown v. Grand Lodge* (Pa. 1904) 57 Atl. 176, the court saying: "Unlike ordinary life insurance, the certificate or policy of a beneficial association creates no vested interest in the beneficiary, but only an expectancy, which cannot become a vested or absolute right to the proceeds of the policy until the death of the assured."

⁵⁰ *Bacon, Ben. Soc. § 321*; *Niblack, Mut. Ben. Soc. (2d Ed.) 234a*; *Hoelt v. Supreme Lodge*, 113 Cal. 91, 45 Pac. 185, 33 L. R. A. 174; *Leftwich v. Wells*, 101 Va. 255, 43 S. E. 364; *Martin v. Stubbings*, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620; *Knights of Honor v. Watson*, 64 N. H. 517, 15 Atl.

tled that a person designated as beneficiary in a mutual benefit certificate cannot complain of the subsequent substitution of another in his place, even though such substitution be arbitrary and unjust, or even fraudulent.⁵¹ Thus, where a beneficiary had for a long time paid the dues necessary to maintain the certificate, it was held that she had, notwithstanding this, no rights which the insured was obliged to respect or which would deprive him of his right to change the beneficiary at will.⁵² So, also, where the insured was induced to change the beneficiary by a designing friend or third person who had not so good a claim to his bounty as the original beneficiary, it was held that the change, although fraudulently induced, was sufficient to entitle the substituted beneficiary to the rights conferred by the certificate.⁵³

Exceptions—Contract Beneficiaries.

An important exception to this general doctrine of the insured's right to change arbitrarily the beneficiary named in the certificate arises in those cases in which the beneficiary has been designated as such in accordance with the terms of a binding contract. Thus, where a member of such an association agrees that he will secure a certificate for the benefit of a person who promises to pay all dues necessary to maintain that certificate, the insured will not then be allowed to ignore his contract obligation and change the beneficiary thus selected.⁵⁴ Such a

125; *Schillinger v. Boes*, 85 Ky. 357, 3 S. W. 427; *Carpenter v. Knapp*, 101 Iowa, 712, 70 N. W. 764, 38 L. R. A. 128.

It has been held, however, that there is no essential difference between mutual benefit and regular insurance in this respect, and that the beneficiary in a benefit certificate takes a vested interest unless the right of change is especially reserved by the charter or by-laws of the association. See *Weisert v. Muehl*, 81 Ky. 336; *Manning v. Ancient Order*, 86 Ky. 136, 5 S. W. 385, 9 Am. St. Rep. 270.

⁵¹ *Hoelt v. Supreme Lodge*, 113 Cal. 91, 45 Pac. 185, 33 L. R. A. 174.

But when the insured was fraudulently induced to make the change at a time when he was mentally incapable of contracting, such change will be declared void and of no effect as to the former beneficiaries. *Cason v. Owens*, 100 Ga. 142, 28 S. E. 75.

⁵² *Spengler v. Spengler* (N. J. Ch.) 55 Atl. 285. Nor was she allowed to recover the premiums paid. But see *Tepper v. Supreme Council*, 59 N. J. Eq. 322, 45 Atl. 111; *National Trust Co. v. Hughes*, 14 Manitoba Rep. 41.

⁵³ *Hoelt v. Supreme Lodge*, 113 Cal. 91, 45 Pac. 185, 33 L. R. A. 174; *Spengler v. Spengler*, supra.

By the application of the same principle, the rights of such a beneficiary are defeated by the suicide of the insured, even though the policy should contain no clause against suicide. *Shipman v. Protected Circle*, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347, overruling *Darrow v. Fund Soc.*, 116 N. Y. 537, 22 N. E. 1093, 6 L. R. A. 495, 15 Am. St. Rep. 430; *Mooney v. Ancient Order (Ky.)* 72 S. W. 288.

⁵⁴ *Smith v. Benefit Soc.*, 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616; *Martin v. Stubbings*, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620; *Jory v. Supreme Council*, 105 Cal. 20, 38 Pac. 524, 26 L. R. A. 733, 45 Am. St. Rep. 17; *Adams*

contract beneficiary has not any vested right in the certificate, but is rather protected by the doctrine of estoppel, for, even though the insured may have the legal right to change the beneficiary, equity will hold him estopped to do so in violation of his contract.

Same—Rights Expressly Vested.

While, as explained above, the nature of mutual benefit insurance is such as by implication to give the insured the right to arbitrarily change the beneficiary, yet it is always possible that the form of the contract may be such as clearly to give the person designated in the certificate the vested contractual rights possessed by the beneficiaries in regular life policies. If such be clearly the intention of the contracting parties, the courts will, of course, give effect to that intention, and hold the rights of the beneficiary vested and indefeasible without his consent.⁵⁵

Mode of Changing Beneficiary.

The contract of the association with its members is to pay the sum specified in the certificate to such person as may be, at the time of the member's death, the appointee in accordance with the regulations of the association; nor is it required to look beyond its regulations in an endeavor to carry out the intention of the deceased member.⁵⁶ Therefore the intention of the deceased member to change the appointed beneficiary, however clearly expressed, will not avail to defeat the latter's claim to payment, unless the mode of expression is that fixed by the rules of the society.⁵⁷

v. Grand Lodge, 105 Cal. 321, 38 Pac. 914, 45 Am. St. Rep. 45; *Grimbley v. Harrold*, 125 Cal. 24, 57 Pac. 558, 73 Am. St. Rep. 19. So, if a binding contract has been made to change the beneficiary, equity will regard the change as made, as between the nominal beneficiary and the person beneficially entitled. See *Pennsylvania Ry. Co. v. Wolfe*, 203 Pa. 269, 52 Atl. 247; *Spengler v. Spengler* (N. J. Ch.) 55 Atl. 285, in which the beneficiary was allowed to take no advantage from her contract because it was made on Sunday.

⁵⁵ *Mason v. Mason* (Ind. App.) 63 N. E. 578, following *Presbyterian Mut. Assur. Fund v. Allen*, 106 Ind. 593, 7 N. E. 317.

⁵⁶ See *Brown v. Grand Lodge* (Pa. 1904) 57 Atl. 176, in which the wife of a member designated as beneficiary was held entitled to payment, though she had been divorced eight years before the member's death. The husband had married again, but had never changed the beneficiary named in his certificate in the manner required by the regulations of the association.

⁵⁷ *Masonic Mut. Ben. Soc. v. Burkhart*, 110 Ind. 189, 10 N. E. 79, 11 N. E. 449; *Berg v. Damkoehler*, 112 Wis. 587, 88 N. W. 606; *Canavan v. Insurance Co.*, 39 Misc. Rep. 782, 81 N. Y. Supp. 304.

A request for change of beneficiary, together with the required fee, sent by mail to the proper authority, but received after the death of the insured, will not confer upon the intended beneficiary any rights under the certificate. See *Fink v. Fink*, 171 N. Y. 616, 64 N. E. 506. Nor will a change without the consent of the association, when the rules require such consent. *National Mut. Aid Soc. v. Lupold*, 101 Pa. 111. See, also, *Grace v. Relief Ass'n*, 87 Wis. 562, 58 N. W. 1041, 41 Am. St. Rep. 62; *McCarthy v. Supreme Lodge*, 153 Mass. 314, 26 N. E. 866, 11 L. R. A. 144, 25 Am. St. Rep. 637.

But this eminently reasonable rule knows some seeming exceptions. Thus, the law never requires of any one impossible things. Therefore, when a member has done all in his power to comply with the requirements of the association, and there remains to be done only acts by the association, or by a third person over whom the member has no control, equity will regard the change as complete, and will protect the rights of the intended beneficiary.⁵⁸

Again, since the regulations in question are made for the benefit and protection of the association, and not on behalf of the beneficiary, it is only the association that can complain of a noncompliance with them. Hence, when the association waives any irregularity in the mode of change, and makes payment to the intended beneficiary, the original beneficiary cannot be heard to complain.⁵⁹

THE RIGHTS OF CREDITORS OF THE INSURED—FIRE POLICIES.

139. The creditors of the insured have no rights whatsoever in the latter's insurance on property prior to the happening of a loss. After a loss has occurred, the claim of the insured becomes a mere chose in action, which is subject, like any other chose, to be seized for the satisfaction of his creditors. But by the weight of authority, the proceeds of insurance upon exempted property are also exempt.

Since a fire policy is peculiarly personal to the insured, it is manifest that such rights as he may have thereunder before the occurrence of a loss are not such as can, without the consent of the insurer, pass to the creditors of the insured. But immediately upon the happening of a loss covered by the policy, there arises under the policy to the insured a right to demand a money payment, a free chose in action. This chose, like any other property of the insured, can be subjected to the payment of his debts by garnishment or other appropriate legal process. So far the courts find no embarrassment in determining the rights of the parties, but a difficult and most perplexing problem is presented when the insured property destroyed was exempt from levy. Thus,

⁵⁸ *Grand Lodge A. O. U. W. v. Noll*, 90 Mich. 37, 51 N. W. 268, 15 L. R. A. 350, 30 Am. St. Rep. 419; *Heydorf v. Conrack*, 7 Kan. App. 202, 52 Pac. 700; *Jinks v. Banner Lodge*, 139 Pa. 414, 21 Atl. 4; *State v. Tomlinson*, 16 Ind. App. 662, 45 N. E. 1116, 59 Am. St. Rep. 335; *Grand Lodge A. O. U. W. v. Child*, 70 Mich. 163, 38 N. W. 1; *Supreme Conclave Royal Adelpia v. Cappella* (C. C.) 41 Fed. 1; *Rollins v. McHatton*, 16 Colo. 203, 27 Pac. 254, 25 Am. St. Rep. 260.

⁵⁹ *Schoenau v. Grand Lodge*, 85 Minn. 349, 88 N. W. 999; *Martin v. Stubblings*, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620; *Manning v. Ancient Order*, 86 Ky. 136, 5 S. W. 385, 9 Am. St. Rep. 270; *Duvall v. Goodson*, 79 Ky. 224; *Supreme Council A. L. H. v. Perry*, 140 Mass. 580, 5 N. E. 634.

when an insured house constituted a part of the debtor's homestead, will the insurance fund be subject to attachment in the hands of the insurer? This question has been answered both negatively and affirmatively by the courts.⁶⁰ It is probable, however, that by the weight of authority the proceeds of insurance upon exempt property is also exempt. In some jurisdictions it is held that such proceeds are exempt only for a reasonable time,⁶¹ or in those cases in which the debtor intends to use the insurance fund in replacing the property destroyed.⁶²

LIFE POLICY PAYABLE TO INSURED.

140. LIFE POLICIES payable to the insured or his estate, when matured, are subject to the claims of creditors just as any other choses may be. Such policies, before maturity, are to be deemed assets for the payment of debts only when by their terms they possess a fixed money value.

As has already become apparent from the preceding discussions, the doctrine that an insurance policy is a chose in action, and, as such, property, is not applied consistently to all cases.⁶³ The decisions of the courts are especially inconsistent and uncertain when they come to construe the rights of creditors of the insured in policies taken out by himself and for his own benefit. It seems, however, to be settled without dispute that such a policy, when matured, by the expiration of some specified period or by the death of the insured, becomes assets subject to the payment of the insured's debts, and therefore liable to be attached in a suit⁶⁴ or to be seized in satisfaction of a judgment; but in

⁶⁰ Insurance on homestead exempt. *Houghton v. Lee*, 50 Cal. 101; *Cameron v. Fay*, 55 Tex. 58; *Chase v. Swayne*, 88 Tex. 218, 30 S. W. 1049, 53 Am. St. Rep. 742; *Bernheim v. Davitt*, 9 Ky. Law Rep. 229, 5 S. W. 193; *Premo v. Hewitt*, 55 Vt. 362.

Contra: *Smith v. Ratcliff*, 66 Miss. 683, 6 South. 460, 14 Am. St. Rep. 606; *Wooster v. Page*, 54 N. H. 125, 20 Am. Rep. 128 (exempt chattels). See, also, *Monniea v. Insurance Co.*, 12 Ill. App. 240; *Fletcher v. Staples*, 62 Minn. 471, 64 N. W. 1150.

⁶¹ *Cooney v. Cooney*, 65 Barb. (N. Y.) 524.

⁶² *Puget Sound Dressed Beef & Packing Co. v. Jeffs*, 11 Wash. 466, 39 Pac. 962, 27 L. R. A. 808, 48 Am. St. Rep. 885. See, also, *Cullen v. Harris*, 111 Mich. 20, 69 N. W. 78, 66 Am. St. Rep. 380.

⁶³ See *RYAN v. ROTHWEILER*, 50 Ohio St. 595, 35 N. E. 679, in which the court says: "The question is not governed so much by the principles of choses in action and vested rights as by the principles, aims, and well-known objects of life insurance. * * * The theory of a failure of trust comes with more force and stronger reasons that the doctrine of choses in action, so strongly urged by counsel for plaintiff in error. We regard the doctrine of choses in action as not fully applicable, because it conflicts in many cases with the controlling doctrine of insurable interest."

⁶⁴ *Trepagnier v. Rose*, 18 App. Div. 393, 46 N. Y. Supp. 397, affirmed 155

those cases where the policy has not been matured, or is still subject to a contingency, such as lapse for failure to pay premiums, or forfeiture for breach of some other condition, it is difficult to determine what is the accepted rule. It may be stated, however, on the probable weight of authority, that an unmatured policy is to be regarded as assets available to the creditors of the insured only when, in accordance with the terms of the contract, the policy has, at the time in question, an absolute money value, as where the insurer agrees to pay a cash surrender value upon the cancellation of the policy;⁶⁵ and that in all other cases where the liability of the company is contingent the policy is not to be regarded as available assets.⁶⁶ And in accordance with the better opinion, it seems that this rule holds good even though, as a matter of fact, the insurer may be willing to pay a considerable sum for the cancellation of the contract.⁶⁷

As has been stated above, wherever a policy is of such a character as to make it subject to seizure by the creditors of the insured, it necessarily passes to an assignee in bankruptcy when proceedings are instituted against the insured under the bankruptcy law.⁶⁸

N. Y. 637, 46 N. E. 1105; *Sexton v. Insurance Co.*, 132 N. C. 1, 43 S. E. 479; *Phenix Ins. Co. v. Willis*, 70 Tex. 12, 6 S. W. 825, 8 Am. St. Rep. 566; *Girard Fire & Marine Ins. Co. v. Field*, 45 Pa. 129.

Such accrued claims may be attached, though disputed or denied by the insurer. See *Crescent Ins. Co. v. Moore*, 63 Miss. 419.

⁶⁵ *Kratzenstein v. Lehman*, 19 App. Div. 228, 46 N. Y. Supp. 71.

⁶⁶ *Bolsseau v. Bass' Adm'r*, 100 Va. 207, 40 S. E. 647; *Day v. Insurance Co.*, 111 Pa. 507, 4 Atl. 748, 56 Am. Rep. 297; *Barbour's Adm'r v. Larue's Assignee*, 51 S. W. 5, 21 Ky. Law Rep. 94; *Pace v. Pace*, 19 Fla. 438; *Barbour v. Insurance Co.*, 61 Conn. 240, 23 Atl. 154; 1 *Freeman on Executions*, § 164a; *Columbia Bank v. Equitable Life Assur. Soc.*, 79 App. Div. 601, 80 N. Y. Supp. 428, reversing 61 App. Div. 594, 70 N. Y. Supp. 767. But see *Rhode Island Nat. Bank v. Chase*, 16 R. I. 37, 12 Atl. 233; *Anthracite Ins. Co. v. Sears*, 109 Mass. 383.

⁶⁷ *Long v. Britannia Co.*, 94 Va. 594, 27 S. E. 499.

⁶⁸ So provided by United States bankruptcy act of 1898, § 70 (5) [U. S. Comp. St. 1901, p. 3451], but allowing the bankrupt to redeem his policy having a cash surrender value by paying such cash amount to the trustee. It is accordingly held that policies, having no surrender value, do not pass to the trustee. *Morris v. Dodd*, 110 Ga. 606, 36 S. E. 83, 50 L. R. A. 33, 78 Am. St. Rep. 129; *In re Buelow* (D. C.) 98 Fed. 86; *In re Lange* (D. C.) 91 Fed. 361; *Holt v. Everall*, 34 L. T. N. S. 599. But otherwise when such surrender value exists. *In re Steele* (D. C.) 98 Fed. 78; *McElroy v. Insurance Co.*, 88 Md. 137, 41 Atl. 112, 71 Am. St. Rep. 400; *Troy v. Sargent*, 132 Mass. 408. But see *In re Murrin*, Fed. Cas. No. 9,968.

POLICY PAYABLE TO A THIRD PERSON.

141. The creditors of the insured have no rights in policies payable to third persons as beneficiaries, unless

- (a) The premiums are paid wholly or in part with money embezzled from the creditors, or
- (b) The beneficiary became such by voluntary assignment after the indebtedness was incurred, or
- (c) Premiums have been paid by an insolvent insured for the purpose of defrauding his creditors, when the proceeds of such insurance will be subject to the claims of creditors to the extent of the fraudulent payments. But it seems the payment of premiums by an insolvent debtor in maintaining a reasonable amount of insurance is not constructively fraudulent. Actual fraud must be proved.

It has been heretofore stated that a policy payable to a beneficiary other than the insured, where no right of change of such beneficiary is reserved, becomes the absolute property of the beneficiary immediately upon its valid issue. It necessarily follows that the insured himself, even though he may have procured the insurance and paid all the premiums necessary to maintain it, has no title or interest in the contract. Consequently, his creditors can find no interest in such a policy which they can subject to the payment of his debts.⁶⁹ This general rule is subject, however, to some apparent exceptions, which are strongly in accord with analogies to be drawn from the general rules of law.

Premiums Paid Wholly or in Part with Embezzled Money.

When a person procures a policy of insurance for the benefit of his wife or some other beneficiary, and pays the first and all subsequent premiums with money embezzled from his employers, it has been held that the legal title vests in the beneficiary, subject to a trust in favor of the persons from whom the funds have been embezzled.⁷⁰ This trust equity will enforce within the amount of the embezzlement, even though the sums paid as premiums are very much less than the amount payable under the policy. On principle, this doctrine would seem to be open to grave question.⁷¹

⁶⁹ But it is held that where a policy payable to the insured has been issued in lieu of a former policy payable to his wife, and surrendered without her knowledge, and has been subsequently assigned, the assignee is entitled to recover the whole amount of such policy, provided he had no knowledge of the fraud upon the beneficiary. The beneficiary was entitled to a paid-up policy as of the time of the surrender of the original policy. *Weatherbee v. Insurance Co.*, 182 Mass. 342, 65 N. E. 383.

⁷⁰ *Holmes v. Gilman*, 138 N. Y. 383, 34 N. E. 205, 20 L. R. A. 572, 34 Am. St. Rep. 470; *Shaler v. Trowbridge*, 28 N. J. Eq. 595.

⁷¹ It would seem that the proceeds of the insurance should merely be subjected to a lien for the repayment of the premiums. Note the reasoning in

It seems, however, that, if a policy has been once honestly procured by the payment of the first premium with the money of the insured or of the beneficiary, subsequent payments of premiums necessary to maintain the policy, with stolen money, will merely give the creditors from whom the money was improperly taken a lien to the extent of the dishonest premiums.⁷²

Fraudulent Transfers of Policies.

A beneficiary may be designated in an insurance contract by subsequent assignment as well as by original appointment, provided the insured was solvent at the time of the assignment; but it is universally held, in the absence of a statute to the contrary, that a voluntary assignment to a person by the insured when insolvent is to be conclusively presumed as in fraud of such creditors,⁷³ and will be set aside in any proper proceeding instituted by them.

Rights of Creditors in Premiums Paid by Insolvent Debtors.

Much conflict has arisen among the courts as to whether the creditors of an insolvent debtor may subject the proceeds of a policy of insurance on his life, but payable to a third person, to the satisfaction of their claims, to the extent to which he has paid premiums in keeping up such insurance after he became insolvent. In some states the matter has been regulated by statute to some extent. Thus by the New York statute a person has the right, although insolvent, to appropriate the sum of not more than \$500 a year to the maintenance of insurance for the benefit of his wife and children.⁷⁴ By implication, however, any sum in excess of that statutory amount paid in premiums would

Central Nat. Bank v. Hume, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370; Harrison v. Ingram, C. A. [1900] 2 Q. B. 710; Holmes v. Gilman, 64 Hun, 227, 19 N. Y. Supp. 151 (reversed 138 N. Y. 383, 34 N. E. 205, 34 Am. St. Rep. 470, 20 L. R. A. 572).

⁷² Holmes v. Davenport, 27 Abb. N. C. 341, 18 N. Y. Supp. 56.

⁷³ Central Nat. Bank v. Hume, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370; Stigler's Ex'x v. Stigler, 77 Va. 163; Stokes v. Coffey, 8 Bush (Ky.) 533; Elliott's Ex'rs Appeal, 50 Pa. 75, 88 Am. Dec. 525; Freeman v. Pope, L. R. 9 Eq. 206. Of course, such assignment is valid as against subsequent creditors. Barbour v. Insurance Co., 61 Conn. 248, 23 Atl. 156; In re Heilbron, 14 Wash. 541, 45 Pac. 155, 35 L. R. A. 604.

It has been held that a transfer of a policy to one having an interest in the life of the insured will not be regarded as in fraud of creditors unless an actual fraudulent intent is proved. State v. Tomlinson, 16 Ind. App. 662, 45 N. E. 1116, 59 Am. St. Rep. 335; Johnson v. Alexander, 125 Ind. 575, 25 N. E. 706, 9 L. R. A. 660.

⁷⁴ N. Y. Laws 1840, c. 80, amended Laws 1870, c. 277. See Stokes v. Amerman, 121 N. Y. 337, 24 N. E. 819; Baron v. Brummer, 100 N. Y. 372, 3 N. E. 474. See, also, Wyman v. Gay, 90 Me. 36, 37 Atl. 325, 60 Am. St. Rep. 238. And see Mahoney v. James, 94 Va. 176, 26 S. E. 385, as to premiums paid from exempted wages.

be deemed as in fraud of creditors.⁷⁵ The leading case on this subject is Central Nat. Bank v. Hume.⁷⁶ In this case the insured, both before and after he became insolvent, took out policies for large amounts, payable to his wife, and on these policies paid large sums in premiums, which the creditors claimed should have been appropriated to the payment of his debts. In the lower court,⁷⁷ it was held that such payments, made after the insolvency of the insured, came under the provisions of the statute of 13 Eliz., and were in fraud of the rights of the creditors. Consequently it was decreed that such portion of the proceeds of these policies upon the death of the insured as would equal the amount of premiums paid in keeping them up after his insolvency should be paid to the creditors. The case was carried on appeal to the Supreme Court of the United States, which reversed the decision of the lower court on the ground that there was no proof of actual fraud in the case, and that the circumstances did not amount to constructive fraud.⁷⁸ The reasoning of the court may be best given in the language of Chief Justice Fuller, as follows:

"This argument in the interest of creditors concedes that the debtor may rightfully preserve his family from suffering and want. It seems to us that the same public policy which justifies this, and recognizes the support of wife and children as a positive obligation in law as well as morals, should be extended to protect them from destitution after the debtor's death, by permitting him, not to accumulate a fund as a permanent provision, but to devote a moderate portion of his earnings to keep on foot a security for support already, or which could thereby be, lawfully obtained, at least to the extent of requiring that, under such circumstances, the fraudulent intent of both parties to the transaction should be made out."

This case has been followed by some of the later cases, both in the inferior federal courts and in some of the states,⁷⁹ but has been sharply criticised in other quarters.⁸⁰ The question is one of great importance

⁷⁵ Stokes v. Amerman, supra; Kittel v. Domeyer, 70 App. Div. 134, 75 N. Y. Supp. 150.

⁷⁶ 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370.

⁷⁷ See 3 Mackey (D. C.) 360, 51 Am. Rep. 780.

⁷⁸ It should be observed that a large portion of the money used by Hume in the payment of premiums was furnished by his wife's mother. Therefore the language used by the court is much broader than the case actually decided.

⁷⁹ Masonic Mut. Life Ass'n v. Paisley (C. C.) 111 Fed. 34; Hendrie & Bolt-hoff Mfg. Co. v. Platt, 13 Colo. App. 15, 56 Pac. 211; State v. Tomlinson, 16 Ind. App. 662, 45 N. E. 1116, 59 Am. St. Rep. 335; Johnson v. Alexander, 125 Ind. 575, 25 N. E. 706, 9 L. R. A. 660.

⁸⁰ See the article of Prof. Williston in 25 American Law Review, 185, in which all the authorities are reviewed, and the conclusion reached by the Supreme Court in the Hume Case is sharply criticised. A summary of Prof.

in insurance law, and it is to be regretted that the Supreme Court has thrown the great weight of its decision in opposition to that generally accepted and thoroughly sound principle of law that no man can be generous, even to those near to his affections, until he has been just in the payment of his debts.

WHEN THE CREDITOR IS THE ASSURED.

142. By the better authority, the rights of a creditor taking out valid insurance upon the life of his debtor are absolute, as far as the debtor is concerned. He may retain the whole proceeds of such insurance, even though it much exceeds the amount of the debt, or even when the debt is wholly paid.

It frequently happens that a creditor finds it to his interest to secure a debt by taking out insurance, payable to himself, upon the life of his debtor. It has already been shown that in securing such insurance he

Williston's views is thus stated in the concluding paragraph: "It is not intended to find fault with the statutory provisions allowing an insolvent debtor to insure his life for the benefit of those dependent upon him. It may well be that such a policy is better for society than to require all assets of every kind to be given up to creditors. What is insisted upon is this: That, by the common law, as brought to this country, no exceptions were made to the sweeping rule that an insolvent debtor could not in any way convey his property to a volunteer, so as to free it from the claim of creditors. The statutes themselves above referred to are an admission of this, for, if the law without the statutes were not what is contended, why pass the statutes? If, now, the sentiment is right and just that a man should make provision to some extent, at least, for those dependent upon him, before paying his debts, and if that sentiment exists among a majority of the people, it should find expression in statute, and the extent of the right should so be properly defined. Till then the rule of the common law should prevail, and the courts, uninfluenced by considerations of meritoriousness, which are for the Legislature to consider, should enforce the law." The views so expressed were expressly adopted by the New Jersey Court of Chancery in *Merchants' & Miners' Transportation Co. v. Borland*, 53 N. J. Eq. 282, 31 Atl. 272, in which it declined to follow the *Hume Case*.

The cases holding that the payment of premiums by an insolvent insured is constructively fraudulent differ with regard to the extent to which the creditors may subject the proceeds of the insurance to their claims. Some hold that the creditors are entitled to such proportion of the insurance fund as the amount of premiums paid after insolvency bears to the whole sum of premiums paid. See *Merchants' & Miners' Transportation Co. v. Borland*, supra; *Fearn v. Ward*, 80 Ala. 555, 2 South. 114; *Kittel v. Domeyer*, 70 App. Div. 134, 75 N. Y. Supp. 150; *PULLIS v. ROBISON*, 73 Mo. 201, 39 Am. Rep. 497, *Woodruff, Ins. Cas.* 375. Other cases hold that the creditors may take from the insurance fund only the amount of premiums fraudulently paid. *Stigler's Ex'x v. Stigler*, 77 Va. 163; *Stokes v. Coffey*, 8 Bush (Ky.) 533; *Pence v. Makepeace*, 65 Ind. 345. The latter view seems clearly preferable.

is not limited to the amount of the debt he seeks to secure, but is required only to contract in good faith.⁸¹ It sometimes occurs that the proceeds of such policies, whether on account of the unexpectedly early death of the insured, or because the debt has been paid or reduced, considerably exceed the amount of the debt and the charges to which the creditor has been put on account of the insurance. A dispute then arises as to whether the insuring creditor is entitled to retain the whole of the proceeds, thus taking profit by the transaction, or whether the excess of such proceeds over the debt and expenses of the creditor should belong to the personal representative of the deceased debtor. In determining such contests, the decisions of the courts have fallen into two classes, in accordance with the theory adopted as to the nature of the transaction: (1) Some courts hold that the creditor, in insuring the life of the debtor, acts to a certain extent as the agent of the debtor, and that the policy is for the latter's benefit, subject to the lien of the debt and charges.⁸² As a consequence of this theory, it naturally follows that these courts give any excess of the insurance money over the debt and charges to the personal representative of the debtor. (2) Other courts adopt the view that the contract is one purely between the insuring creditor and the insurer; that the debt gives the creditor an insurable interest; and that the contract made is one with which the

⁸¹ See ante, p. 138. The creditor insuring is entitled to have paid out of the proceeds of his policy debts that are barred by the statute of limitations. *Townsend v. Tyndale*, 165 Mass. 293, 43 N. E. 107, 52 Am. St. Rep. 513; *RAWLS v. INSURANCE CO.*, 27 N. Y. 282, 84 Am. Dec. 280.

⁸² *Goldbaum v. Blum*, 79 Tex. 638, 15 S. W. 564; *Exchange Bank of Macon v. Loh*, 104 Ga. 446, 31 S. E. 459, 44 L. R. A. 372; *Tate v. Commercial Bldg. Ass'n*, 97 Va. 74, 33 S. E. 382, 45 L. R. A. 243, 75 Am. St. Rep. 770 (dictum); *WARNOCK v. DAVIS*, 104 U. S. 775, 26 L. Ed. 924 (dictum); *Crotty v. Insurance Co.*, 144 U. S. 621, 12 Sup. Ct. 749, 36 L. Ed. 566, in which the policy was payable to "Michael Crotty, creditor"; *Strode v. Drug Co.* (Mo. App.) 74 S. W. 379. In this case, A. being indebted to B. in the sum of \$50, secured life insurance to the amount of \$5,000—\$50 payable to A.'s widow, and the balance to B., who was to pay the first and all subsequent premiums. The insurance was out of all honest proportion to the debt (see *Commack v. Lewis*, 15 Wall. 643, 21 L. Ed. 244), and the case clearly comes within the rule of *WARNOCK v. DAVIS*, supra. But the court, in limiting B.'s rights in the proceeds of the policy to his debt and charges, laid down a broader rule, as follows: "The construction our courts put on such transactions as we have here is that the creditor, whether he be named as payee of the policy when it is issued, or becomes the payee afterwards by assignment, acquires the status of beneficiary as far as is necessary to make him whole, and no further. As to the remainder of the insurance money, he stands as trustee for the estate of the insured, or whomsoever the insured may have validly appointed to be residuary beneficiary. * * * The law views the contract of insurance as having been made for the benefit of the appellant to the extent of its interest in Stokes' life, and for the benefit of Stokes' estate as to the excess of the fund realized from the policy."

debtor has absolutely no concern, and in which he can take no interest, since it is a well-settled principle that the decrease or termination of the interest upon which the life insurance contract is based does not in any wise affect the right of the assured to enforce that contract.⁸³ These courts hold that the insuring creditor may collect and retain the entire amount payable under the policy, even though the debt may have been wholly paid by the insured before his death.⁸⁴

The weight of authority appears to be in favor of the former view, although many of the courts that have laid down this doctrine have done so gratuitously;⁸⁵ but it would seem that the second view, as stated above, is more in accordance with the fixed rules of insurance law, as well as the dictates of reason. If this view is supported by the fewer authorities, it will be found that they are better reasoned, and have been decided upon issues properly raised, rather than upon those assumed for purposes of obiter dictum.

THE RIGHTS OF THE ASSIGNEE.

143. IN GENERAL—The rights of the assignees of the proceeds of fire policies are not different from those of assignees of ordinary choses in action, and require no special discussion. Assignments of life policies, however, give rise to some special rules.

144. ASSIGNEES OF LIFE POLICIES fall into three classes:

- (a) The assignment may be made without consideration to one whom the insured desires to make a beneficiary under the policy.
- (b) The assignment may be conditional—made by the insured as collateral security for a debt. An assignment absolute in form may be shown by parol to be conditional in fact.
- (c) The assignment may be absolute—intended to be an outright sale by the insured of all of his right and interest in the policy.

145. EFFECT OF SUCH ASSIGNMENTS—While there is much confusion in the cases, the effect of these several kinds of assignment may be thus stated:

- (a) A voluntary assignee, intended to be thereby made beneficiary, whether possessing an insurable interest or not, takes the same

⁸³ *DALBY v. ASSURANCE CO.*, 15 C. B. 365, Richards, Ins. Cas. 271, Woodruff, Ins. Cas. 7, overruling *GODSALL v. BOLDERO*, 9 East, 72; *AMICK v. BUTLER*, 111 Ind. 578, 12 N. E. 518, 60 Am. Rep. 722; *Ferguson v. Insurance Co.*, 32 Hun (N. Y.) 306; *Grant's Adm'rs v. Kline*, 115 Pa. 618, 9 Atl. 150; *Shaffer v. Spangler*, 144 Pa. 223, 22 Atl. 865; *Coon v. Swan*, 30 Vt. 6; *Corson's Appeal*, 113 Pa. 438, 6 Atl. 213, 57 Am. Rep. 479.

⁸⁴ *DALBY v. ASSURANCE CO.*, supra; *Ferguson v. Insurance Co.*, supra; *Central Nat. Bank v. Hume*, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370 (dictum).

⁸⁵ It will be observed that, in all the cases laying down the rule that the debtor's personal representative may recover from the insuring creditor the balance of the insurance fund after the debt and charges are satisfied, the evidence showed either an assignment by the debtor by way of collateral security, or that the creditor had procured the insurance under an agreement with the debtor. Note *Exchange Bank of Macon v. Loh*, supra.

rights under the policy as if originally designated beneficiary, provided the assignment was not in fraud of creditors, and also provided it was made in good faith.

- (b) When the assignment is conditional, whether the condition be expressed or not, the assignee takes only such interest in the proceeds as will reimburse him for the charges incurred on account of the insurance, and repay the debt due, with interest.
- (c) When the assignment is absolute, and no circumstances of fraud or imposition are shown, the assignee takes absolutely the whole proceeds of the policy, even though it be in excess of his expenditures on this account. There is much authority, however, to the contrary.

The general question of assignability of insurance policies, whether fire or life, will be reserved for discussion in a future chapter.⁸⁶ In the present discussion, it will be assumed that the assignments under consideration are valid, so far as the insurer is concerned; the disputes with reference to them existing only between the assignor and assignee, or their representatives.

Assignees of Fire Policies.

The assignment of a fire policy before it becomes a fixed liability by the loss of the property insured can be made only with the consent of the insurer, which transforms the assignment into a novation, and eliminates any question of conflicting rights of assignor and assignee.⁸⁷ The rights of the mortgagee as assignee will be considered in the next section.

After a contract of fire insurance becomes a fixed liability upon the insurer, it may be assigned with all the freedom of any other chose in action,⁸⁸ and the rules applicable to such assignments are those of the general law of contracts. Assignments of life policies, however, raise many peculiar and difficult questions, which must now be considered.

Assignment of Life Policies.

It is well first to say that when a life policy has matured, and has become an absolute liability on the part of the insurer, it is subject to assignment, just as are other claims for money. Such assignments

⁸⁶ See post, c. 14.

⁸⁷ Of course, the assignee takes only such rights as were possessed by the assignor at the time of the assignment; that is, the insurer can set up against the assignee any defenses that might have been set up against the assignor. But the consent of the insurer to the assignment will operate as a waiver of all defenses then known to him. *HALL v. INSURANCE CO.*, 93 Mich. 184, 53 N. W. 727, 18 L. R. A. 135, 32 Am. St. Rep. 497; *Ellis v. Insurance Co.*, 64 Iowa, 507, 20 N. W. 782.

⁸⁸ *IMPERIAL FIRE INS. CO. v. DUNHAM*, 117 Pa. 460, 12 Atl. 668, 2 Am. St. Rep. 686. When the insured is bankrupt, his rights will pass to his trustee in bankruptcy. *Fuller v. Insurance Co.*, 184 Mass. 12, 67 N. E. 879.

will not be further considered.⁸⁰ When, however, the policy is assigned while it remains a contingent liability, many interesting questions peculiar to insurance law call for determination.

In considering these questions, the reader will bear in mind the general rules that have been discussed in the preceding questions. Thus the insured cannot assign a policy payable to a third person as beneficiary without that beneficiary's consent. Again, a benefit certificate in a mutual association, whose charter and by-laws limit the beneficiaries to the exclusion of creditors, cannot, it is apparent, be regarded as commercially assignable.⁸⁰ Likewise it will be apparent that, in most jurisdictions, rights vesting in the beneficiary of the policy are regarded as assignable choses in action, when it is not otherwise stipulated by statute.⁸¹ Therefore in the following discussion we shall consider only those assignments rightfully made by the insured, eliminating those of other parties who may be concerned.

Source of Confusion among the Cases.

The numerous cases to be found in recent Reports discussing the legal consequences of assignments of life policies made by parties insured seem at first to be hopelessly in conflict. This conflict, however, is more apparent than real, resulting in an unfortunate accumulation of plausible obiter dictum. This confusion is due to a failure to recognize the differing classes of assignments that come before the courts for adjudication. It is as unwise to consider all the assignments of insurance policies as subject to the same rule, as it would be to subject all conveyances of real estate to a single rule; and it is believed that much of the confusion to be found among the cases can be done away with by properly distinguishing the different kinds of assignments therein brought in question.

Beneficiary Designated by Assignment.

The maxim that one cannot do indirectly what is not allowed to be done directly is frequently made the basis of the statement that, inasmuch as one cannot procure insurance directly upon a life in which he is not interested, he will not be allowed to secure indirectly by assignment such insurance upon that life. This observation is eminently sound, if suitably restricted, but, applied too generally, it becomes most misleading. It is very true that one person cannot induce another, in

⁸⁰ *Curtiss v. Insurance Co.*, 90 Cal. 245, 27 Pac. 211, 25 Am. St. Rep. 114. Nor will an attempt to prohibit such an assignment by contract be valid or effective. *Briggs v. Earl*, 139 Mass. 473, 1 N. E. 847.

⁸⁰ *Clarke v. Schwarzenberg*, 162 Mass. 98, 38 N. E. 17; *Dale v. Brumbly*, 54 Md. 674, 54 Atl. 655.

But see *Jarvis v. Binkley* (Ill.) 69 N. E. 582.

⁸¹ See *Dannhauser v. Wallenstein*, 169 N. Y. 199, 62 N. E. 160, for an excellent review of the legislation in New York upon this subject.

whose life he has no interest, to procure insurance upon his own life with the intention of assigning it at once to the former person, who agrees to bear all the expense incident to the procurement and maintenance of the policy. Such a transaction is plainly but a palpable evasion of the sound rule of law prohibiting wager policies. Such an assignment, being in bad faith and in fraud of the law, is universally held to be void.⁸²

On the other hand, there is no reason whatsoever why one who has in good faith procured a valid policy of insurance upon his own life shall not afterwards assign that policy to some third person, whom he desires to make the beneficiary of the insurance, as where a man assigns to his wife a policy of insurance procured upon his own life, and payable to himself, before marriage. As we have seen above, an insolvent debtor may not make such a transfer, since it is regarded as in fraud of the rights of his creditors, but, barring insolvency and bad faith, such assignees, although purely voluntary, take all of the rights that have been heretofore discussed as accruing to a vested beneficiary.⁸³

Conditional Assignments to Creditors.

One of the most valuable uses to which unmaturing insurance policies are put is their assignment as collateral security for debts already existing or then incurred. The mutual rights of assignors and assignees in such cases naturally vary in accordance with the terms of the assignment, but frequently it becomes incumbent upon the assignee to pay premiums necessary to keep the policy in force. Applying to assignments of this kind the general rule applicable to all pledges, we easily derive the rule that the assignee's rights in the proceeds of the policy are limited to an amount equal to the debt secured, the premiums paid, and the interest thereon. As between the insured and assignee, the latter is entitled to the whole proceeds, but he holds the excess beyond his interest, as above described, in trust for the personal representatives of the deceased debtor.⁸⁴ From this doctrine there is no dissent.

⁸² *WARNOCK v. DAVIS*, 104 U. S. 775, 26 L. Ed. 924; *Mutual Life Ins. Co. v. Armstrong*, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997; *Heusner v. Insurance Co.*, 47 Mo. App. 343. See *National Life Ass'n v. Hopkins' Adm'r*, 97 Va. 167, 33 S. E. 539.

⁸³ *In re Steele* (D. C.) 98 Fed. 78; *Tremblay v. Insurance Co.*, 97 Me. 547, 55 Atl. 509; *Appeal of Colburn*, 74 Conn. 463, 51 Atl. 139, 92 Am. St. Rep. 231; *PATTERSON v. INSURANCE CO.*, 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. Rep. 899.

⁸⁴ *Roller v. Moore's Adm'r*, 86 Va. 512, 10 S. E. 241, 6 L. R. A. 136; *Griswold v. Insurance Co.*, 1 Mo. App. 97; *Id.*, 70 Mo. 654; *Mutual Benefit Life Ins. Co. of Newark v. First Nat. Bank of Louisville*, 74 S. W. 1066, 25 Ky. Law Rep. 172; *Gilman v. Curtis*, 66 Cal. 116, 4 Pac. 1094; *Wells v. Archer*, 10 Serg. & R. (Pa.) 412, 13 Am. Dec. 682; *Page v. Burnstine*, 102 U. S. 664, 26 L. Ed. 268; *Burnam v. White* (Ky.) 22 S. W. 555.

Absolute Assignments to Purchasers.

Pursuing the line of reasoning heretofore adopted with reference to the character of the insurance policy as a chose in action, it would seem to follow that when the chose belongs to the insured, free from the rights of any other person, he should be allowed to sell it at whatever price he can secure, and to transfer an absolute and complete title to the purchaser. In fact, such a course often becomes necessary to the holder of a life policy. Such a loan or surrender value as he may obtain from the company may be inadequate for his necessities, and he may find it expedient to convert his whole interest in the policy into cash. When, under such circumstances, the insured sells a valuable policy to one who purchases it as a chose in action in good faith, it is held by the better-reasoned cases, and by probably a majority of the cases in point, that such a bona fide purchaser takes an absolute title to the policy, even though he had no preceding insurable interest, and even though the proceeds of the policy may greatly exceed the amount which he paid for the assignment.⁹⁵ If dictum is to be taken as authority, undoubtedly the weight of authority is in favor of applying to even an absolute assignment of the kind described the same rule that has been stated above as properly applicable to conditional assignments.⁹⁶ But a careful examination of the cases will show that,

⁹⁵ Metropolitan Life Ins. Co. v. Brown, 159 Ind. 644, 65 N. E. 908; St. John v. Insurance Co., 13 N. Y. 31, 64 Am. Dec. 529; VALTON v. ASSURANCE CO., 20 N. Y. 32; Olmsted v. Keyes, 85 N. Y. 593; WRIGHT v. ASSOCIATION, 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731, 16 Am. St. Rep. 749; STEINBACK v. DIEPENBROCK, 158 N. Y. 24, 52 N. E. 662, 44 L. R. A. 417, 70 Am. St. Rep. 427; MUTUAL LIFE INS. CO. OF NEW YORK v. ALLEN, 133 Mass. 24, 52 Am. Rep. 245; Eckel v. Renner, 41 Ohio St. 232; Martin v. Stubblings, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620; Ulrich v. Reinhoehl, 143 Pa. 238, 22 Atl. 862, 13 L. R. A. 433, 24 Am. St. Rep. 534; McHale v. McDonnell, 175 Pa. 632, 34 Atl. 906; Wheeland v. Atwood, 192 Pa. 237, 43 Atl. 946, 73 Am. St. Rep. 803; Crosswel v. Association, 51 S. C. 103, 28 S. E. 200; Bursinger v. Bank, 67 Wis. 75, 30 N. W. 290, 58 Am. Rep. 843; Fairchild v. Association, 51 Vt. 613; Mechanics' Nat. Bank v. Comins (N. H.) 55 Atl. 191; Chamberlain v. Butler, 61 Neb. 730, 86 N. W. 481, 54 L. R. A. 338, 87 Am. St. Rep. 478; Fitzgerald v. Insurance Co. 56 Conn. 116, 13 Atl. 673, 17 Atl. 411, 7 Am. St. Rep. 288; Clark v. Allen, 11 R. I. 439, 23 Am. Rep. 496; Murphy v. Red, 64 Miss. 614, 1 South. 761, 60 Am. Rep. 68; RITTLER v. SMITH, 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844. See, also, Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. Ed. 251; British Eq. Ins. Co. v. Great Western Ry. Co., 38 L. J. Ch. 132; MUTUAL LIFE INS. CO. v. ALLEN, 133 Mass. 24, 52 Am. Rep. 245. But see Stevens v. Warren, 101 Mass. 564, in which the policy prohibited assignment. In New Jersey no insurable interest is required to support a contract of insurance. It necessarily follows that an assignee without interest may acquire absolute rights in the policy assigned. See VIVAR v. KNIGHTS OF PYTHIAS, 52 N. J. Law, 455, 20 Atl. 36. In California the right of absolute assignment is affirmed by express statutory provision. Cal. Civ. Code, § 2764.

⁹⁶ Alabama Gold Life Ins. Co. v. Mobile Mut. Ins. Co., 81 Ala. 329, 1 South.

in most of those in which this statement is made, the case actually before the court was one of conditional assignment as collateral security for a debt.⁹⁷

RIGHTS OF MORTGAGOR AND MORTGAGEE.

146. The rights of the mortgagor and mortgagee in the proceeds of insurance upon the mortgaged property vary in accordance with the terms of the contract.
- (a) When the mortgagor insures his own interest for his separate benefit, the mortgagee takes no rights whatever in the proceeds.
 - (b) When the mortgagee insures his interest on his sole account, money paid by the insurer will not inure to the benefit of the mortgagor.
 - (c) When the mortgagor insures for the benefit of the mortgagee, or is under contract so to do, the insurance money must be applied to the payment of the mortgage debt.
 - (d) When the mortgagee insures under a provision that the premiums paid shall be added to the mortgage debt, insurance money received will reduce that debt pro tanto.
147. A policy issued to the mortgagor, payable to the mortgagee as his interest may appear, will be defeated by any default on the part of the mortgagor, unless its terms establish an independent collateral contract between the insurer and the mortgagee.

It is well recognized that both the mortgagor and mortgagee have insurable interests in property mortgaged, and that these interests are separate and distinct from each other. It is usual for the parties to stipulate in the mortgage deed for insurance on the subject of the mortgage and for payment of the premiums, but sometimes there is an entire lack of agreement as to insurance. In construing the rights of mort-

561; Exchange Bank of Macon v. Loh, 104 Ga. 446, 31 S. E. 459, 44 L. R. A. 372; Schlamp v. Berner's Adm'r, 51 S. W. 312, 21 Ky. Law Rep. 324; Missouri Valley Life Ins. Co. v. McCrum, 36 Kan. 146, 12 Pac. 517, 59 Am. Rep. 537; Price v. Bank, 62 Kan. 743, 64 Pac. 639; Heusner v. Insurance Co., 47 Mo. App. 336; Mutual Life Ins. Co. v. Richards (Mo. App.) 72 S. W. 487; Powell v. Dewey, 123 N. C. 103, 31 S. E. 381, 68 Am. St. Rep. 818; Tate v. Association, 97 Va. 74, 33 S. E. 382, 45 L. R. A. 243, 75 Am. St. Rep. 770; WARNOCK v. DAVIS, 104 U. S. 775, 26 L. Ed. 924; New York Life Ins. Co. v. Davis, 96 Va. 737, 32 S. E. 475, 44 L. R. A. 305; Kessler v. Kuhns, 1 Ind. App. 511, 27 N. E. 980; Thornburg v. Insurance Co., 30 Ind. App. 682, 66 N. E. 922.

⁹⁷ This will be apparent from examining the Virginia cases, which declare that the assignee cannot take an absolute interest in an insurance policy, in every one of which the assignment was conditional. Roller v. Moore's Adm'r, 86 Va. 512, 10 S. E. 241, 6 L. R. A. 136; Long v. Britannia Co., 94 Va. 594, 27 S. E. 499; Beaty v. Downing, 96 Va. 451, 31 S. E. 612; New York Life Ins. Co. v. Davis, 96 Va. 737, 32 S. E. 475, 44 L. R. A. 305; Tate v. Association, 97 Va. 74, 33 S. E. 382, 45 L. R. A. 243, 75 Am. St. Rep. 770.

gagors and mortgagees, respectively, to the proceeds of insurance in the latter event, we shall first consider those cases in which the contracts are made separately and independently.

Separate Insurance by the Mortgagor.

As heretofore shown, the contract of insurance is strictly a personal contract, and never runs with the property insured. Accordingly it follows that where the mortgagor independently insures his own interest in the mortgaged premises, without reference to any contract with the mortgagee, the proceeds of such insurance in case of destruction of the property belong solely to the mortgagor, freed from any lien or other claim by the mortgagee.⁹⁸ This rule obtains even though there may be a stipulation in the mortgage contract providing that the mortgagee may insure and charge the premiums to the mortgagor, to be covered by the security of the mortgage. Thus, in a recent case in the Supreme Court of the United States,⁹⁹ a corporation which had executed a mortgage to a trustee to secure an issue of bonds insured its plant on its own account. The mortgagee trustee had procured no insurance, although authorized to do so by the mortgage deed. Upon the destruction of the plant by fire, and the serious impairment of the security offered to the bondholders by the mortgage, the trustee claimed that the proceeds of the insurance obtained by the mortgagor should be impressed with a trust in favor of the bondholders. The court held, however, that there was no contract obligation upon the mortgagor to insure, and that consequently the insurance money belonged solely and absolutely to the mortgagor.

Separate Insurance by the Mortgagee.

In a like manner the mortgagee may insure his interest in the property independently of the mortgagor.¹⁰⁰ In that event, upon the destruction of the property the payment of insurance money to the mortgagee will not inure to the benefit of the mortgagor, whose debt remains still wholly unpaid.¹⁰¹ The mortgagee, however, is not in a

⁹⁸ *Shadgett v. Phillips*, 131 Ala. 478, 31 South. 20, 56 L. R. A. 461, 90 Am. St. Rep. 95; *Ryan v. Adamson*, 57 Iowa, 30, 10 N. W. 287; *Stamps v. Insurance Co.*, 77 N. C. 209, 24 Am. Rep. 443; *COLUMBIA INS. CO. v. LAWRENCE*, 10 Pet. 507, 9 L. Ed. 512; *Wheeler v. Insurance Co.*, 101 U. S. 439, 25 L. Ed. 1055.

⁹⁹ *Farmers' Loan & Trust Co. v. Penn Plate Glass Co.*, 186 U. S. 434, 22 Sup. Ct. 842, 46 L. Ed. 1234.

¹⁰⁰ The mortgagee insures only his debt. When his debt is in any way discharged, the insurance terminates. *Carpenter v. Insurance Co.*, 16 Pet. 495, 10 L. Ed. 1044; *Phenix Ins. Co. v. First Nat. Bank*, 85 Va. 767, 8 S. E. 720, 2 L. R. A. 667, 17 Am. St. Rep. 102. So, where a mortgagee has purchased property at foreclosure sale, even though the redemption period is not expired. *Reynolds v. Insurance Co.*, 128 Cal. 16, 60 Pac. 467, 79 Am. St. Rep. 17.

¹⁰¹ *International Trust Co. v. Boardman*, 149 Mass. 158, 21 N. E. 239; *Ha-*

position to enforce this claim against the mortgagor, but it passes by subrogation to the insurer.¹⁰²

Insurance by Mortgagor for Benefit of Mortgagee.

It is competent for the mortgagor to take out insurance for the benefit of the mortgagee, and, indeed, this is the usual practice. The mortgagee may be made the beneficial payee in several different ways. He may become the assignee of the policy with the consent of the insured, or the mere pledgee without such consent; or the original policy may contain a mortgage clause, or a rider making the policy payable to the mortgagee as his interest may appear may be subsequently attached; or, lastly, the policy itself may be payable absolutely to the mortgagor, but taken out in pursuance of a contract to that effect with the mortgagee, in which case the mortgagee acquires an equitable lien upon the proceeds.¹⁰³ In all of these cases the proceeds of the policy will be subject to the same claims by the mortgagee as could have been enforced by him against the property insured.

Insurance by Mortgagee on Behalf of Mortgagor.

In the preceding paragraph we have spoken of the contracts to which the mortgagor is a party, and the mortgagee beneficially interested. Practically the same rules obtain when the mortgagee himself procures the policy as a contracting party in accordance with the terms of an agreement by which the mortgagor is to pay the premiums upon such insurance. Upon the destruction of the property the mortgagee is entitled to receive payment from the insurer, but such payment discharges the debt, if equal to it, and, if greater than the debt, the mortgagee holds the excess as trustee for the mortgagor.¹⁰⁴ It seems, however, that, if the insurer stipulates for subrogation to the rights of the mortgagee under the mortgage, the payment of such a policy

ley v. Insurance Co., 120 Mass. 293, 296; *Foster v. Van Reed*, 70 N. Y. 19, 26 Am. Rep. 544. But see *Home Ins. Co. v. Marshall*, 48 Kan. 235, 29 Pac. 161; *Carpenter v. Insurance Co.*, 16 Pet. 495, 10 L. Ed. 1044.

The same rule has been held to apply to insurance by an attaching creditor. See *Trust Co. v. Boardman*, supra.

¹⁰² *EXCELSIOR FIRE INS. CO. v. ROYAL INS. CO.*, 55 N. Y. 343, 14 Am. Rep. 271; *NORWICH FIRE INS. CO. v. BOOMER*, 52 Ill. 442, 4 Am. Rep. 618.

In Massachusetts it seems to be held that the mortgagee may collect both the insurance and the mortgage debt. *SUFFOLK FIRE INS. CO. v. BOYDEN*, 9 Allen (Mass.) 123; *KING v. INSURANCE CO.*, 7 Cush. (Mass.) 1, 54 Am. Dec. 683. It is otherwise, however, when the mortgagee agrees that the insurer shall be subrogated. *Allen v. Insurance Co.*, 132 Mass. 480.

¹⁰³ *Wheeler v. Insurance Co.*, 101 U. S. 439, 25 L. Ed. 1055.

¹⁰⁴ *Buffalo Steam Engine Works v. Sun Mut. Ins. Co.*, 17 N. Y. 403; *Waring v. Loder*, 53 N. Y. 581; *KING v. INSURANCE CO.*, 7 Cush. (Mass.) 1, 54 Am. Dec. 683 (dictum).

will not discharge the debt, even though the mortgagee may have procured the policy by arrangement with the mortgagor.¹⁰⁵

Rights of Mortgagee as Affected by Default of Mortgagor.

Some confusion will be observed in the cases which treat of the effect wrought upon the rights of the mortgagee under a policy in which he is beneficiary by the default of the mortgagor, but by the better authorities it seems to be settled that where the mortgagee is made merely a beneficiary under the contract, and recognized as such by the insurer, but not made a party to the contract itself, any default on the part of the mortgagor, which will by the terms of the policy defeat it, will also defeat all rights of the mortgagee under that contract, even though he himself may not have been in any fault.¹⁰⁶ This result obtains whether the policy is made payable to the mortgagee "as his interest may appear" or by assignment.

By reason of the insufficiency of the security to the mortgagee under policies taken out by the mortgagor, and made payable to the mortgagee as his interest may appear, on account of the rule just stated above, it has now become customary to insert in the mortgagor's policy a clause not only making the policy payable to the mortgagee so far as necessary to cover his interest, but also providing that the default of the mortgagor shall not defeat the rights of the mortgagee. Such a clause in effect amounts to an independent collateral contract between the insurer and the mortgagee. Therefore we have the general rule that, wherever the terms of the mortgage clause are such as to amount to a contract with the mortgagee, his interest will remain unaffected by any default of the mortgagor to which the mortgagee is not a party.¹⁰⁷

¹⁰⁵ *Springfield Fire & Marine Ins. Co. v. Allen*, 43 N. Y. 389, 3 Am. Rep. 711; *PHENIX INS. CO. v. FIRST NAT. BANK*, 85 Va. 765, 8 S. E. 719, 2 L. R. A. 667, 17 Am. St. Rep. 101; *Carpenter v. Insurance Co.*, 16 Pet. 495, 10 L. Ed. 1044.

¹⁰⁶ The New York standard policy expressly so stipulates, as follows: "If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto." *Delaware Ins. Co. v. Greer*, 120 Fed. 916, 57 C. C. A. 188, 61 L. R. A. 137; *Keith v. Insurance Co.*, 117 Wis. 531, 94 N. W. 295; *Jaskulski v. Insurance Co.*, 131 Mich. 603, 92 N. W. 98; *Rosenstein v. Insurance Co.*, 79 N. Y. Supp. 736, 79 App. Div. 481.

¹⁰⁷ *Smith v. Insurance Co.*, 25 R. L. 260, 55 Atl. 715; *Glens Falls Ins. Co. v. Porter (Fla.)* 33 South. 473.

RIGHTS OF LIFE TENANT AND REMAINDERMAN.

148. The interests of life tenant and remainderman are separate, and insurance procured independently by either will not inure to the benefit of the other. But if the life tenant insures the fee, he will hold the excess above his interest as trustee for the remainderman.

Somewhat similar to the relations discussed in the last section are those of the life tenant and remainderman or reversioner, who hold entirely distinct interests in the property in which their several estates inhere. The life tenant may insure the property for the protection of his own interest solely, and, if such be the clear intent of the contract, upon the destruction of the property the life tenant will take the proceeds of the insurance absolutely, and not merely a life interest in them.¹⁰⁸ This is true even though the policy may give the insurer the option to rebuild, in which case, of course, the benefit of the performance of the contract would inure to the ultimate benefit of the remainderman.

It appears, however, that a warehouseman, carrier, or other bailee may take out insurance upon the property in his possession which will inure to the benefit of the owners of such property, at the same time as it protects the bailee's interest.¹⁰⁹ In like manner, if the life tenant takes out insurance not merely upon his life interest, but upon the property as of fee, he will be deemed to be acting for the remainderman or reversioner, even though the contract is made without the knowledge of the latter, since it is entirely competent for him to ratify the act of his unauthorized agent. In such cases the life tenant will receive the whole of the proceeds, but will hold the excess above his interest as trustee for the reversioner.¹¹⁰ The principles thus stated apply equally well to all cases of particular and expectant estates, such as those of lessor and lessee.

¹⁰⁸ *Bennett v. Featherstone (Tenn.)* 71 S. W. 589; *HARRISON v. PEPPER*, 166 Mass. 288, 44 N. E. 222, 33 L. R. A. 239, 55 Am. St. Rep. 404; *Kearney v. Kearney*, 17 N. J. Eq. 504. But see, contra, *Green v. Green*, 50 S. C. 514, 27 S. E. 952, 62 Am. St. Rep. 846.

¹⁰⁹ See *Southern Cold Storage & Produce Co. v. Dechman (Tex. Civ. App.)* 73 S. W. 545.

¹¹⁰ *Welsh v. Assurance Co.*, 151 Pa. 607, 25 Atl. 142, 31 Am. St. Rep. 786. So, when property insured for the benefit of the owner or his personal representatives is burned after the death of the insured, the life tenant under the will of the decedent will take only a life interest in the insurance money. See *Brough v. Higgins*, 2 Grat. (Va.) 408; *Haxall's Ex'rs v. Shippen*, 10 Leigh (Va.) 536, 34 Am. Dec. 745; *Culbertson v. Cox*, 29 Minn. 309, 13 N. W. 177, 43 Am. Rep. 204.

SUBROGATION.

149. PROPERTY INSURANCE—An insurer indemnifying the insured for any loss of property suffered is entitled to be subrogated to any legal right or claim belonging to the insured at the time of loss by virtue of which he might have compelled another to make compensation for such loss.

150. LIFE INSURANCE—The doctrine of subrogation has no application to life insurance. It has also been held that it is likewise inapplicable to accident insurance.

The Equitable Doctrine of Subrogation.

The right of subrogation, as enforced by the courts, is defined as "an auxiliary equity called into being for the purpose of enabling a party secondarily liable, but who has paid the debt, to reap the benefit of any securities which the creditor may hold against the principal debtor, and by the use of which the party paying may thus be made whole."¹¹¹ Primarily, it is the right of the assured, paying his principal's debt, to be placed in the position of the creditor for the purpose of enforcing payment by the principal.¹¹² As has been heretofore seen, the law of insurance is but a wide extension of the general doctrine of suretyship, and it is therefore to be expected that the doctrine of subrogation should play a large part in determining the correlative rights of the parties to insurance contracts. The doctrine has easy application to all cases in which the loss for which the insurer is liable under the policy was caused by the tortious conduct of some third person. Thus, where property is destroyed by a fire caused by the negligent emission of

¹¹¹ Blsp. Eq. p. 45. "Whenever, to protect his own rights, one not a volunteer pays or satisfies a debt for which another is primarily liable, he is subrogated to the rights of the creditor, and may enforce against the person primarily liable all the securities, benefits, and advantages held by the creditor." Eaton, Eq. 511.

¹¹² The rule is thus stated by Mr. Justice Gray in *St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 11 Sup. Ct. 554, 35 L. Ed. 154: "In fire insurance, as in marine insurance, the insurer, upon paying to the assured the amount of a loss of the property insured, is doubtless subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss. But the right of the insurer against such other person does not rest upon any relation of contract or of privity between them. It arises out of the nature of the contract of insurance as a contract of indemnity, and is derived from the assured alone, and can be enforced in his right only. By the strict rules of the common law, it must be asserted in the name of the assured. In a court of equity or of admiralty, or under some state codes, it may be asserted by the insurer in his own name. But in any form of remedy the insurer can take nothing by subrogation but the rights of the assured, and, if the assured has no right of action, none passes to the insurer."

sparks from a railroad company's locomotive, it is clear that the insurer, upon indemnifying the insured for the loss, will be entitled to be subrogated to the insured's right of action against the railway company.¹¹³

The operation of this equity also harmoniously supports another well-recognized rule in insurance law; that is, that the insured shall not receive by reason of his contract of insurance anything more than mere indemnity for his loss suffered. If he were allowed to recover the amount of his loss from the tortfeasor and also from the insurance company, his misfortune would result in profit, rather than loss, and undoubtedly tend to greatly increase the number of such misfortunes.

When we come to consider whether the doctrine of subrogation in insurance law shall extend not only to those cases in which the insured possesses some right or claim by virtue of which he can demand from some other person than the insured compensation for the loss suffered, but also to those in which the insured, by reason of the existence of some independent contract not in any wise related to the insurance or the cause of the loss, is in a position to escape injury by that loss, we encounter much difficulty. In the leading English case of *Castellain v. Preston*,¹¹⁴ the facts briefly were as follows: The owners of real property previously insured had executed a binding contract for its sale. After the execution of the contract, but before the conveyance, the buildings were damaged by fire, and payment was made by the insurance company to the vendor. Subsequently the vendees performed their contract, paying the purchase money, as they were required by law to do, without deducting the loss by fire. The vendors were thus in possession of the insurance money, and also of the purchase money, which represented the full value of the uninjured property; thus having made a handsome profit by reason of the fire. The insurance company then brought its suit to recover the amount of the insurance, claiming to be subrogated to the vendors' rights under the executory contract of sale. In the lower court¹¹⁵ it was decided by Chitty, J., that the insurer was not entitled to subrogation, but in the Court of

¹¹³ *Mobile Ins. Co. v. Columbia & G. R. Co.*, 41 S. C. 408, 19 S. E. 558, 44 Am. St. Rep. 725; *HOME MUT. INS. CO. v. OREGON RY. & NAV. CO.*, 20 Or. 569, 26 Pac. 857, 23 Am. St. Rep. 151; *CONNECTICUT FIRE INS. CO. v. ERIE RY. CO.*, 73 N. Y. 399, 29 Am. Rep. 171, Woodruff, Ins. Cas. 550; *PHOENIX INS. CO. v. ERIE & W. TRANSPORTATION CO.*, 117 U. S. 312, 6 Sup. Ct. 750, 29 L. Ed. 873, Woodruff, Ins. Cas. 553.

In a court of admiralty, the subrogated insurer may proceed against the carrier in his own name. *Liverpool & G. W. S. Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788.

¹¹⁴ *CASTELLAIN v. PRESTON*, 11 Q. B. Div. 880, Richards, Ins. Cas. 282, Woodruff, Ins. Cas. 536.

¹¹⁵ 8 Q. B. Div. 613.

Appeal this judgment was reversed; Brett, L. J., laying down the principle of subrogation applicable in these broad terms:¹¹⁶

"Now it seems to me that, in order to carry out the fundamental rule of insurance law, this doctrine of subrogation must be carried to the extent which I am now about to endeavor to express, namely, that, as between the underwriter and the assured, the underwriter is entitled to the advantages of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured, by the exercise or acquiring of which right or condition the loss against which the assured is insured can be or has been diminished. That seems to me to put this doctrine of subrogation in the largest possible form, and, if in that form, large as it is, it is short of fulfilling that which is the fundamental condition, I must have omitted to state something which ought to have been stated."

Notwithstanding the cogent reasoning of the careful and learned opinion of the English court, one feels sorely discontented with the result reached by the court. It is probable, however, that the mistake in reasoning was made not in this particular case, but in the preceding case of *Rayner v. Preston*,¹¹⁷ in which it was decided that the vendor could retain the insurance money as against the vendee. In any event, it may be safely stated that the doctrine of *Castellain v. Preston* has never been accepted in this country,¹¹⁸ nor is it likely to be in future

¹¹⁶ 11 Q. B. Div. 388. Lord Justice Brett bases this statement upon this thoroughly sound observation: "The very foundation, in my opinion, of every rule which has been applied to insurance law, is this, namely: That the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and, if ever a proposition is brought forward which is at variance with it—that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity—that proposition must certainly be wrong."

¹¹⁷ *RAYNER v. PRESTON*, L. R. 18 Ch. Div. 1, Woodruff, Ins. Cas. 344, Richards, Ins. Cas. 276. This case has been repudiated in this country. See *Skinner & Sons' Ship Building & Dry Dock Co. v. Houghton*, 92 Md. 68, 48 Atl. 85, 84 Am. St. Rep. 485. But see ante, p. 49.

¹¹⁸ *Washington Fire Ins. Co. v. Kelly*, 32 Md. 421, 3 Am. Rep. 149.

In *Michael v. Insurance Co.*, 171 N. Y. 25, 63 N. E. 810, it was held that an insurer paying an indemnity under its policy for loss of "use and occupancy" of an elevator was not entitled to be subrogated to the rights of the owner of the elevator under a pooling contract by which each of the parties

cases. Therefore we may say that in the United States, at least, the insurer's right of subrogation will be limited to those rights which the insured may have to recover compensation from some third person because of some tort or contract liability arising out of the loss, and not merely collateral to it.

Release of Tort Feasor by the Insured.

As is apparent from the above definition, the insurer can claim to be subrogated only to such rights as inhere in the insured at the time of the loss. Therefore, if for any reason the insured at that time has no such right, as where he has agreed in a bill of lading that the carrier shall have the benefit of insurance, it is manifest that the insurer's right of subrogation is cut off.¹¹⁹ But just so soon as the loss occurs the insurer's right to subrogation to any then existing rights of the insured become vested, and any act of the insured in releasing such rights will discharge the insurer pro tanto. Thus, if the property insured is destroyed by the negligence of some tortfeasor, any release

was to receive a percentage of the profits made by the pooled concerns, even though his elevator might become incapacitated for use by reason of fire.

So in *FOLEY v. INSURANCE CO.*, 152 N. Y. 131, 46 N. E. 318, 43 L. R. A. 664, an insurer was denied subrogation under facts practically identical with those in *CASTELLAIN v. PRESTON*. The owner insured some dwelling houses in course of erection, although under their agreement the contractors were obligated to complete the buildings before receiving any pay. The uncompleted houses were burned, and the insurer held liable to pay, without hope of subrogation to the insured's rights under the building contract. In closing its opinion, the court makes this broad statement: "The fact that improvements on land may have cost the owner nothing, or that, if destroyed by fire, he may compel another person to replace them without expense to him, or that he may recoup his loss by resort to a contract liability of a third person, in no way affects the liability of the insurer, in the absence of any exemption in the policy."

¹¹⁹ *Deming v. Storage Co.*, 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518; *Wager v. Insurance Co.*, 150 U. S. 99, 14 Sup. Ct. 55, 37 L. Ed. 1013; *St. Louis, I. M. & S. R. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 11 Sup. Ct. 554, 35 L. Ed. 154; *PHOENIX INS. CO. v. ERIE & W. TRANSPORTATION CO.*, 117 U. S. 312, 6 Sup. Ct. 750, 29 L. Ed. 873.

The same result follows when the carrier has procured the insurance, and is named as payee in the policy, even though the insurance company may have made payment to the shipper upon the order of the carrier. See *Wager v. Insurance Co.*, supra; *Delahunt v. Insurance Co.*, 97 N. Y. 537.

The insurer cannot refuse payment because the insured has agreed that the carrier shall have the benefit of the insurance. *Jackson Co. v. Boylston Mut. Ins. Co.*, 139 Mass. 508, 2 N. E. 103, 52 Am. Rep. 728. But when the policy provides that it shall be void "if the insured shall make or have any contract or understanding whereby any person or corporation shall not be liable for any act or neglect in causing the fire," so as to defeat its right of subrogation, an agreement of release made with the tortfeasor before the fire will discharge the insurer. *Kennedy v. Insurance Co.*, 119 Iowa, 29, 91 N. W. 831.

given to him by the insured without the consent of the insurer will operate as a discharge of the insurer's liability.¹²⁰ So, if a mortgagee, whose separate interest was insured, should, after loss, release the mortgage to the extent of the insurance, the insurer would be discharged.¹²¹

After the insured is paid under his policy, the tortfeasor will not be allowed to do any act that will defeat the insurer's right of subrogation. If, with knowledge of the previous payment by the insurer, the tortfeasor does procure a release by settlement with the insured, such release will be no defense as against the insurer.¹²² In the absence of a statute permitting a suit in his own name, the insurer must sue in the name of the insured. The recovery, however, will be for the benefit of the insurer.¹²³

This right of substitution exists irrespective of contract, but the contract of insurance may expressly provide that the insurer shall be entitled to subrogation as against any one causing a loss for which he is liable.¹²⁴ If such a contract is made, the insured cannot disre-

¹²⁰ *FAYERWEATHER v. INSURANCE CO.*, 118 N. Y. 324, 23 N. E. 192, 6 L. R. A. 805, Woodruff, Ins. Cas. 557; *Newcomb v. Insurance Co.*, 22 Ohio St. 382, 10 Am. Rep. 746; *HALL v. RAILWAY CO.*, 13 Wall. 367, 20 L. Ed. 594. The insured, while retaining the money received under a settlement with the tortfeasor, cannot repudiate the release given on the ground that it was fraudulently obtained. *Highlands v. Insurance Co.*, 203 Pa. 134, 52 Atl. 130. See *Chickasaw County Farmers' Mut. Fire Ins. Co. v. Weller*, 98 Iowa, 731, 68 N. W. 443. Here the insurer was allowed to recover from the insured money paid without knowledge of the fact that the insured had settled with the tortfeasor.

But the insured is under no obligation actively to preserve any lien or other security which might inure to the benefit of the paying insurer. Thus it was held that the failure of the insured to take such steps after a fire as were necessary to perfect a mechanic's lien upon the insured property did not discharge the insurer. See *ROYAL INS. CO. v. STINSON*, 103 U. S. 25, 26 L. Ed. 473.

¹²¹ See *Carpenter v. Insurance Co.*, 16 Pet. 495, 10 L. Ed. 1044. It is evident that a different rule would prevail in Massachusetts. *Foster v. Insurance Co.*, 2 Gray (Mass.) 216; *International Trust Co. v. Boardman*, 149 Mass. 153, 21 N. E. 239, and cases there cited.

¹²² *CONNECTICUT FIRE INS. CO. v. ERIE RY. CO.*, 73 N. Y. 399, 29 Am. Rep. 171; *HART v. RAILROAD CORP.*, 13 Metc. (Mass.) 99, 46 Am. Dec. 719.

¹²³ *Monmouth County Mut. Fire Ins. Co. v. Hutchinson*, 21 N. J. Eq. 107; *HART v. RAILROAD CORP.*, 13 Metc. (Mass.) 99, 46 Am. Dec. 719; *Rockingham Mut. Fire Ins. Co. v. Boshier*, 39 Me. 253, 63 Am. Dec. 618; *St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 11 Sup. Ct. 554, 35 L. Ed. 154.

¹²⁴ The New York standard fire policy so provides in these terms: "If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment."

gard it, and release before loss a right of action which he might otherwise have had. Thus, when the insured had previously agreed that the insurer should be subrogated to any claims which the insured might have against the carriers who were to transport the property, and then accepted a bill of lading from the carriers, in which it was stipulated that they should have the benefit of any insurance procured by the shipper, the unfortunate insured was held to have cut off his rights against both insurer and carriers.¹²⁵ Of course, however, where the tortfeasor has contracted for the benefit of the insurance, he will be liable for the excess of the loss actually caused above the amount of insurance.

No Subrogation until Indemnity Complete.

As stated above, one of the reasons for enforcing the doctrine of subrogation is to prevent the insured from ever receiving more than an actual indemnity for his loss. But the owner of the destroyed property is entitled to full indemnity, and the doctrine of subrogation will not be applied in any case so as to deprive him of this right. Thus, where the insurer has paid under a policy of insurance upon the mortgagee's separate interest, he is not entitled to be subrogated to the mortgagee's rights in the mortgage so long as any of the mortgage debt remains unpaid. The insurer must either pay the unsatisfied balance of the mortgage debt, and then require the assignment of the mortgage, or else must be content to take the remainder of the proceeds upon the foreclosure of the mortgage after the mortgagee's debt has been completely satisfied.¹²⁶

The equity of subrogation is not enforced in favor of a mere volunteer. The insurer claiming subrogation must have paid under legal necessity. Therefore it was held that, where one of several insurers paid more than his share of a loss suffered, he was not entitled to be

¹²⁵ *FAYERWEATHER v. INSURANCE CO.*, 118 N. Y. 324, 23 N. E. 192, 6 L. R. A. 805, Woodruff, Ins. Cas. 557; *Carstairs v. Insurance Co. (C. C.)* 18 Fed. 473. But if the acceptance of bills of lading from the carrier giving him the benefit of insurance violates a term of the policy and avoids the insurance, so that at the time of loss there is no valid insurance, the carrier cannot set up in successful defense the agreement of the shipper that he shall have the benefit of any insurance procured. *Inman v. Railway Co.*, 129 U. S. 128, 9 Sup. Ct. 249, 32 L. Ed. 612. The same rule has been applied even when the insurer paid the avoided policy upon condition of being allowed to enforce the insured's right of recovery against the carrier. *Southard v. Railway Co.*, 60 Minn. 382, 62 N. W. 442.

¹²⁶ *PHENIX INS. CO. v. FIRST NAT. BANK*, 85 Va. 767, 8 S. E. 720, 2 L. R. A. 667, 17 Am. St. Rep. 102, Woodruff, Ins. Cas. 578; *ROYAL INS. CO. v. STINSON*, 103 U. S. 25, 26 L. Ed. 473; *Carpenter v. Insurance Co.*, 16 Pet. 501, 10 L. Ed. 1044.

subrogated to the rights of the insured in order to secure contribution from the other insurers as to such excess.¹²⁷

No Subrogation in Life Insurance.

It is well settled that the insurer making payment under a life policy is not entitled to be subrogated to any rights as against a tortfeasor who may have wrongfully brought about the death of the insured.¹²⁸ The reason given for this holding is the familiar rule that at common law a personal action dies with the person, and that there can be no right of action in the insured at the time of his death to which the insurer could claim subrogation. Lord Campbell's act, giving a right of action for death by wrongful act, bestowed that right upon the administrator or other personal representative of the deceased as a separate and distinct cause of action, usually stipulated to be for the benefit of certain specified persons. The right given by such act is not one belonging to the insured, which could pass to the insurer.

Another reason doubtless existing for such holding, although not brought out by the courts, is that the doctrine of subrogation and indemnity are indissolubly connected, and that, since a life insurance contract is more truly a contract of investment than of indemnity, the right of subrogation does not accompany it.

Accident Insurance.

It is manifest that the two reasons assigned above as prohibiting the application of subrogation to life insurance contracts do not so fully apply to accident insurance. A contract of accident insurance is more truly a contract of indemnity, and, save in those cases where death results from the accident, the insured has a right of action against third persons tortiously causing the accident, which could be assigned by him to the insurer, and which, it seems, by all the principles of equity, should be so assigned. It has, however, been held that subrogation shall not be allowed to the accident insurer on the slender ground that accident insurance is more like life insurance than fire or marine insurance.¹²⁹

¹²⁷ *Hanover Fire Ins. Co. v. Brown*, 77 Md. 64, 25 Atl. 989, 27 Atl. 314, 39 Am. St. Rep. 386.

¹²⁸ *Mobile Life Ins. Co. v. Brame*, 95 U. S. 754, 24 L. Ed. 580; *CONNECTICUT MUT. LIFE INS. CO. v. NEW YORK & N. H. R. CO.*, 25 Conn. 265, 65 Am. Dec. 571.

¹²⁹ *Etna Life Ins. Co. v. J. B. Parker & Co.*, 96 Tex. 287, 72 S. W. 168, 580. The only reason given for the decision is: "We think it is to be observed that, so far as the right of subrogation is concerned, accident insurance is more analogous to life insurance than it is either to marine or fire insurance, and it has been held that it does not apply in case of life insurance." See, further, same case, 30 Tex. Civ. App. 521, 72 S. W. 621; also *Bradburn v. Railway Co.*, L. R. 10 Exch. 1. But note the implication that the accident insurer might be subrogated in *Harding v. Townshend*, 43 Vt. 536, 5 Am. Rep. 304.

CHAPTER XII.

THE STANDARD FIRE POLICY.

- 151-152. The General Rule of Construction.
- 153. The Effect of Temporary Breach of Condition.
- 154. The Term of Insurance.
- 155-156. The Subject of Insurance—Description.
- 157. The Subject of Insurance—Location.
- 158-160. The Interest of the Insured.
- 161. Change of Interest, Title, or Possession.
- 162. Fraud and False Swearing.
- 163. Other Insurance.
- 164. Operation of Factories.
- 165. Increase of Risk.
- 166. Making Repairs.

THE GENERAL RULE OF CONSTRUCTION.

- 151. The general rule of construction applied by the courts to all contracts of insurance is that while, like other contracts, they are to be so construed as to give effect to the intention of the parties, yet where there exists any doubt as to that intention it is always to be resolved strictly against the insurer and in favor of the insured.
- 152. AS APPLIED TO THE STANDARD POLICY—Despite the fact that in some states insurance contracts are required by law to be made in accordance with a statutory form, it is now settled that the same rules of construction are to be applied to the terms of the statutory policy as to other forms of policies.

It must be confessed that many decisions justify the assertion, somewhat made, that a different rule of construction is applied by the courts to insurance contracts from that which applies to contracts of other kinds.¹ But, as a matter of law, an insurance contract should be construed as any other contract,² the real purpose of the construction being to give full effect to the intention of the parties so far as that intention is legal. But the peculiar circumstances under which the insurance contract is made, and the fact that its terms are invariably chosen by the insurer without consultation with the other party

¹ On this point read *Welch v. Fire Ass'n* (Wis. 1904) 98 N. W. 227.

² *Crane v. Insurance Co. (C. C.)* 3 Fed. 558; *Fireman's Ins. Co. v. Cecil*, 12 Ky. Law Rep. 48, 259; *American Accident Co. v. Reigart*, 94 Ky. 547, 23 S. W. 191, 21 L. R. A. 651, 42 Am. St. Rep. 374; *Stettiner v. Insurance Co.*, 12 N. Y. Super. Ct. 594; *Savage v. Insurance Co.*, 44 How. Prac. (N. Y.) 40; *Farmers' Mut. Fire Ins. Co. v. Marshall*, 29 Vt. 23.

to the contract, together with the necessarily complicated and difficult conditions that are always inserted in these particular contracts, have caused that rule of construction which provides that words shall be taken most strongly against the one using them, to have peculiar, and sometimes rather startling, significance. The tendency of the courts to emphasize this rule was greatly strengthened by the one-time practice of insurance companies of placing such numerous and lengthy conditions in such very small type in their policies as practically to prohibit their being read or understood by the insured. The courts naturally went to the extreme limit of the law, and sometimes even beyond that limit, in order to prevent the insurer from trapping the insured by any such inequitable method of doing business. The natural result has been that in many cases the insurance companies have thus overreached themselves, and induced the courts to allow dishonest claims that would scarcely have been considered if made under contracts less unfair on their face.

*The Construction of Standard Policies.**

While many of the unfair features of the earlier policies have been eliminated from the modern standard policy, the courts still apply to this instrument the same rule of construction as the considerations just mentioned led them to apply to the old forms. Any doubtful terms are always construed in favor of the insured. It has been contended that inasmuch as the law compels the use of the standard policy, and will not allow any variance from it, excepting in certain limited particulars, the insurer cannot be regarded as selecting the terms of the contract, and subjected to an unfavorable rule of construction on that account. This contention, however, has been held to be without merit, for the terms of these statutory policies were chosen with reference to the construction given by the precedent cases to similar terms in other policies, and therefore ought to be regarded as being used in the sense of their previous construction.⁴ It is also apparent from an

* In discussing the rules of construction that have been applied by the courts to the provisions of the standard policy, no effort will be made to collect and classify all the cases, or even give numerous illustrations of the applications of the rules stated. The purpose of this chapter is merely to indicate the principles which guide the courts in the construction of each clause of the policy, and to give such illustrations from the enormous body of case-law on this subject as will insure a ready understanding of the principle by the reader. A statement of all the cases construing the various clauses, though useful to the practitioner, would be out of place in such a work as this. They are properly to be sought in the digests.

⁴ See *John Davis & Co. v. Insurance Co. of North America*, 115 Mich. 382, 73 N. W. 393. In *Quinlan v. Insurance Co.*, 133 N. Y. 356, 31 N. E. 81, 28 Am. St. Rep. 645, the following language was used by Andrews, J.: "The act (chapter 488, Laws 1886) providing for a uniform policy known as the 'standard policy,' and which makes its use compulsory upon insurance com-

examination of the instruments themselves, as well as the history of their adoption, that their terms were really chosen by the underwriters with particular reference to their own interests.⁵

The New York standard policy, which is in more general use than any other standard form, and is therefore selected as the text for this chapter, although carefully drawn, is not in such literary form as to excite the admiration of the reader. It does not admit of any constructive analysis which would serve as an outline for a treatise upon its construction. Its conditions are roughly divided into those (1) that make the contract void in its inception, (2) those that may render it void during its currency, and (3) those that must be complied with as precedent to a valid claim for payment after loss has occurred. But even such a meager analysis cannot be followed in its treatment, as it is not consistently maintained in the body of the instrument. Therefore, in the following pages, for the purpose of economizing space, as well as to give a greater unity to the treatment of the subject, it has been necessary to vary somewhat the order in which the

panies, marks a most important and useful advance in legislation relating to contracts of insurance. The practice which prevailed before this enactment, whereby each company prescribed the form of its contract, led to great diversity in the provisions and conditions of insurance policies, and frequently to great abuse. Parties taking insurance were often misled by unusual clauses or obscure phrases concealed in a mass of verbiage, and often so printed as to elude discovery. Unconscionable defenses, based upon such conditions, were not infrequent, and courts seem sometimes to have been embarrassed in the attempt to reconcile the claims of justice with the law of contracts. Under the law of 1886, companies are not permitted to insert conditions in policies at their will. The policies that they now issue must be uniform in their provisions, arrangement, and type. Persons seeking insurance will come to understand to a greater extent than heretofore the contract into which they enter. Now, as heretofore, it is competent for the parties to a contract of insurance, by an agreement in writing or by parol, to modify the contract after the policy has been issued, or to waive conditions or forfeitures. The power of agents, as expressed in the policy, may be enlarged by usage of the company, its course of business, or by its consent, express or implied. The principle that courts lean against forfeitures is unimpaired, and in weighing evidence tending to show a waiver of conditions or forfeitures the courts may take into consideration the nature of the particular condition in question, whether a condition precedent to any liability or one relating to the remedy merely, after a loss has been incurred. But where the restrictions upon an agent's authority appear in the policy, and there is no evidence tending to show that his powers have been enlarged, there seems to be no good reason why the authority expressed should not be regarded as the measure of his power; nor is there any reason why courts should refuse to enforce forfeitures plainly incurred, which have not been expressly or impliedly waived by the company." See, also, *Fidelity & Casualty Co. v. Waterman*, 161 Ill. 632, 44 N. E. 283, 32 L. R. A. 654.

⁵ For the history of the adoption of the New York standard policy, see ante, p. 29.

several terms of the policy are set forth. In the appendix, however, the standard policy is printed in full, with such reference to the treatment of its provisions in the text as will avoid any confusion.

The Extent to Which the Standard Policy may be Varied.

In New York and in most of the states in which the New York standard policy has, with minor variations, been adopted, the parties are forbidden by law to depart from or vary the terms of the standard policy, save in certain specified particulars, by the use of prescribed special "clauses" or riders. In Massachusetts, New Hampshire, and some other states, however, the parties may add to or change the terms of the standard form within certain limits, as their various purposes may render expedient. In all of the states that have adopted the standard form of policy, with the exception of North Carolina, its use is enforced by certain penalties. In those states contracts made in any other than the prescribed form are held to be wholly unenforceable as against the insured, but in most of the states are expressly made binding upon the insurer.⁶ In fact, while the purpose of the standard form is to insure the making of a contract that shall be fair for both parties, it is primarily intended for the benefit of the insured, and he will not be deprived by the operation of such laws of any rights which he might otherwise have taken under a contract.⁷ Therefore it has been held that the doctrine of waiver and estoppel applies against the insurer and in favor of the insured in the case of contracts in the standard form as well as when the form of the contract is left wholly to the discretion of the parties.⁸ So, the subsequent conduct of the insurer may operate to enlarge the authority given in the policy, although it is necessarily held that the insured has knowledge of any limitations upon the agent's authority that may be found in the policy. The standard form being a public act, the terms of the policy are deemed to be known to all.⁹ Neither do the standard policy acts preclude the making of a valid oral contract of insurance.¹⁰

⁶ See *Armstrong v. Insurance Co.*, 95 Mich. 137, 54 N. W. 637.

⁷ *Forward v. Insurance Co.*, 142 N. Y. 382, 37 N. E. 615, 25 L. R. A. 637; *THEBAUD v. INSURANCE CO.*, 155 N. Y. 516, 50 N. E. 284; *Sternaman v. Insurance Co.*, 170 N. Y. 13, 62 N. E. 763, 57 L. R. A. 318, 88 Am. St. Rep. 625.

⁸ *WOOD v. INSURANCE CO.*, 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733; *THEBAUD v. INSURANCE CO.*, 155 N. Y. 516, 50 N. E. 284; *Sternaman v. Insurance Co.*, 170 N. Y. 13, 62 N. E. 763, 57 L. R. A. 318, 88 Am. St. Rep. 625; *Stage v. Insurance Co.*, 76 App. Div. 509, 78 N. Y. Supp. 555. And see *Welch v. Fire Ass'n (Wis. 1904)* 98 N. W. 227, in which the previous cases in that state are reviewed.

⁹ *Quinlan v. Insurance Co.*, 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645.

¹⁰ *HICKS v. ASSURANCE CO.*, 162 N. Y. 284, 56 N. E. 743, 43 L. R. A. 424.

THE EFFECT OF TEMPORARY BREACH OF CONDITION.

153. In many jurisdictions it is held that a temporary breach of a condition subsequent, not contributing to a subsequent loss, merely suspends the policy. The better opinion is, however, that any breach of condition, which by the terms of the policy avoids it, absolutely defeats all rights of the insured under the policy, which can be re-established only by a waiver of the breach by the insurer.

The language of the standard policy provides that "this entire policy shall be void" in case any of the conditions thereof are broken. No little conflict exists among the decisions as to the significance of the phrase. In the first place, we may note that it eliminates the discussion, heretofore considered, as to whether the contract is divisible or indivisible. By express statement the contract is entire.¹¹ Likewise all of the authorities are agreed that the term "void" is not to be construed in accordance with its real meaning, but as "voidable." The insurer can, and frequently does, waive his right to avoid the contract on the ground of breach of condition, and, as we have already seen, such a waiver, whether express or implied, always reinstates the policy. Further, it is agreed that if the breach of condition exists at the time of the fire, or if, previously existing, it contributed to bring about the loss, the insurer is not bound under the contract unless a waiver of the breach can be shown.¹²

But suppose the breach of condition has been merely temporary; that it has long ceased to exist before the occurrence of the loss to which it in no wise contributed; as if, to use an illustration given by the Illinois court,¹³ a gallon of gasoline had been kept for a day in a house subsequently destroyed in the Chicago fire? In such cases it seems a great hardship upon the insured to declare his insurance defeated by what proved to be a wholly immaterial breach of condition. Moved by a most commendable desire to escape working such a hardship, many of the American courts have laid down the doctrine that the clause above quoted, declaring that the policy shall be void upon breach of condition, means that the policy shall be merely suspended during

¹¹ See ante, p. 69; *Smith v. Insurance Co.*, 118 N. Y. 518, 23 N. E. 883. But see *Trabue v. Insurance Co.*, 121 Mo. 75, 25 S. W. 848, 23 L. R. A. 719, 42 Am. St. Rep. 523.

¹² *Continental Ins. Co. v. Browning*, 24 Ky. Law Rep. 992, 70 S. W. 660; *Hunt v. Insurance Co. (Neb.)* 92 N. W. 921; *Cassimus v. Insurance Co.*, 135 Ala. 256, 33 South. 163; *Mississippi Fire Ass'n v. Dobbins*, 81 Miss. 630, 33 South. 506; *German Ins. Co. v. Shader (Neb.)* 93 N. W. 972, 60 L. R. A. 918.

¹³ *Traders' Ins. Co. v. Catlin*, 163 Ill. 256, 45 N. E. 255, 35 L. R. A. 595.

a temporary breach of condition, provided that the breach did not contribute to the loss.¹⁴

It would seem clear, however, that such a construction ignores the familiar principle that, when the terms of a contract are clearly stated, the court should enforce them as made, however harshly they may bear upon one of the parties.¹⁵ It seems difficult to escape the conclusion that, if the insurer once has the right to avoid a policy for breach of condition, that right must remain his until he relinquishes it by a waiver, or estops himself to set it up. On this ground it has been held by the better authorities in this country that a breach of condition may always be set up as a defense by the insurer, even if it may have been temporary, and in no wise have affected the insurer injuriously.¹⁶ But the courts are zealous to discover that the acts complained of do not amount to a breach of condition, in order, if possible, to save the insured the benefit of his contract.¹⁷

¹⁴ Putnum v. Insurance Co. (C. C.) 4 Fed. 753; Phoenix Ins. Co. v. Lawrence, 4 Metc. (Ky.) 9, 81 Am. Dec. 521; Mutual Fire Ins. Co. v. Coatesville Shoe Factory, 80 Pa. 407; New England Fire & Marine Ins. Co. v. Wetmore, 32 Ill. 245; Schmidt v. Insurance Co., 41 Ill. 295; Insurance Co. of North America v. McDowell, 50 Ill. 120, 99 Am. Dec. 497; Traders' Ins. Co. v. Catlin, 163 Ill. 256, 45 N. E. 255, 35 L. R. A. 595; Hinckley v. Insurance Co., 140 Mass. 38, 1 N. E. 737, 54 Am. Rep. 445; WORTHINGTON v. BEARSE, 12 Allen (Mass.) 382, 90 Am. Dec. 152; LANE v. INSURANCE CO., 12 Me. 44, 28 Am. Dec. 150; Power v. Insurance Co., 19 La. 28, 36 Am. Dec. 665; Obermeyer v. Insurance Co., 43 Mo. 573.

¹⁵ Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231.

¹⁶ Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231; Lyman v. Insurance Co., 14 Allen (Mass.) 329; Germania Fire Ins. Co. v. Deckard, 3 Ind. App. 361, 28 N. E. 868; Howell v. Equitable Soc., 16 Md. 377; MEAD v. INSURANCE CO., 7 N. Y. 530; Merriam v. Insurance Co., 21 Pick. (Mass.) 162, 32 Am. Dec. 252; KYTE v. ASSURANCE CO., 149 Mass. 116, 21 N. E. 361, 3 L. R. A. 508, Richards, Ins. Cas. 457; Turnbull v. Insurance Co., 83 Md. 312, 34 Atl. 875; Newport Imp. Co. v. Home Ins. Co., 163 N. Y. 237, 57 N. E. 475; First Congregational Church v. Holyoke Fire Ins. Co., 158 Mass. 475, 33 N. E. 572, 19 L. R. A. 587, 35 Am. St. Rep. 508. In Albion Lead Works v. Williamsburg City Fire Ins. Co. (C. C.) 2 Fed. 479, the court said if there were two or more changes, one of which increased the risk, it is no answer to the plea of forfeiture to say that another diminished it.

¹⁷ McGannon v. Insurance Co., 171 Mo. 143, 17 S. W. 160, 94 Am. St. Rep. 778. In this case the plaintiff agreed to keep a watchman on the premises at all times when the machinery was not in operation. Two competent men were employed as watchmen. One of them about 10 o'clock one night left his post, without the knowledge or consent of the insured, and the fire occurred before the other man, whose watch began at 12, came on duty. The court held that the most that could be claimed by the insurer was that the clause was a condition subsequent, breach of which would defeat the insurance; and that the condition was satisfied by the employment of two competent men for that purpose.

In Springfield Fire & Marine Ins. Co. v. Wade, 95 Tex. 598, 68 S. W. 977,

THE TERM OF INSURANCE.

154. The language describing the term during which the policy affords protection will be so construed as to secure for the insured the benefit of the insurance, if it is reasonably possible to do so.

In construing the language used to designate the term during which the policy is in force, the general rule of construction as to including and excluding terminal days is as follows: If the policy is said to run from one day to another, the first day is held to be excluded and the latter day included.¹⁸ Where no provision to the contrary is found, the insurance does not expire until midnight of the last day of the term.¹⁹ Frequently, however, it is specified that the insurance shall be in force from 12 o'clock noon on one day until the same hour on another day, in which case there can exist no doubt as to the duration of the term, excepting where there are different methods of computing time. In Jones v. Insurance Co.,²⁰ a building that was insured until 12 o'clock, at noon, of September 18, 1897, caught on fire at 11:45 a. m. of that date by sun time, and 12:02 p. m. by standard time. The court, in holding the insurance company liable, decided that the expression "12 o'clock at noon" was to be construed as applying to sun time, unless it could be clearly shown that the parties, at the time of the contract, had in mind the standard time. If the fire originates within the time of the insurance, the insurer will be liable for the whole amount of loss within the limits of the insurance, though it may

58 L. R. A. 714, 93 Am. St. Rep. 870, the policy sued on contained a warranty that gasoline should not be "kept, used, or allowed" on the premises. The wife of the insured got a gallon for use on the premises without his consent. The part unused was left by her in a basin on the premises. The insured, thinking the basin contained water, threw a burning match into it, which resulted in the destruction of the property. The court allowed the insured to recover, on the ground that he neither "kept, used, or allowed" gasoline on the premises, within the meaning of the policy.

Plinsky v. Insurance Co. (C. C.) 32 Fed. 47; Summerfield v. Assurance Co. (C. C.) 65 Fed. 292; HOSFORD v. INSURANCE CO., 127 U. S. 399, 8 Sup. Ct. 1199, 32 L. Ed. 196; Bryant v. Insurance Co., 17 N. Y. 200; HARPER v. INSURANCE CO., 17 N. Y. 194; London & L. Fire Ins. Co. v. Crunk, 91 Tenn. 376, 23 S. W. 140; Hall v. Insurance Co., 58 N. Y. 292, 17 Am. Rep. 255; Lancaster Silver Plate Co. v. National Fire Ins. Co., 170 Pa. 151, 32 Atl. 613; Same v. Manchester Fire Assur. Co., 170 Pa. 166, 32 Atl. 616; Albion Lead Works v. Williamsburg City Fire Ins. Co., supra.

¹⁸ McCrea v. Insurance Co., 26 U. C. C. P. 431; Isaacs v. Insurance Co., L. R. 5 Exch. 296; Atkins v. Insurance Co., 5 Metc. (Mass.) 439, 39 Am. Dec. 692.

¹⁹ Penn Plate Glass Co. v. Spring Garden Ins. Co., 189 Pa. 255, 42 Atl. 138, 69 Am. St. Rep. 810.

²⁰ 110 Iowa, 75, 81 N. W. 188, 46 L. R. A. 860. See, also, Henderson v. Reynolds, 84 Ga. 159, 10 S. E. 734, 7 L. R. A. 327.

continue to rage some time after the expiration of the policy.²¹ This is but an application of the general and reasonable principle that the insurer shall be liable for all direct loss by fire during the term of insurance. If the destructive force is set in operation before the expiration of the policy, the mere fact that part of the actual destruction takes place afterwards does not make it any less the approximate result of that force.

When the policy provides that it shall expire at 12 o'clock noon, this midday limit will not apply to other designations of time that may be made in the policy. Thus, where the insurer is allowed to terminate the insurance on giving five days' notice, the policy remains in force until midnight of the fifth day after the notice is given.²² A policy which, by its terms, is to be operative between certain dates therein specified, is in effect only for a term excluding both dates.²³

THE SUBJECT OF INSURANCE—DESCRIPTION.

155. The courts liberally construe words of description, in order to include within them all articles which, by reasonable inference, the parties intended to be covered by the insurance. Parol testimony may be admitted to explain the meaning of doubtful expressions.

156. The expressions "held in trust" or "on commission," etc., as applied to chattels insured, will be construed not technically, but liberally, to mean any goods of others in the possession of the insured.

In General.

The construction of the expressions used in describing the property covered by insurance is often difficult, and has given rise to much litigation. The description is necessarily written in the policy by the parties, the terms being usually chosen by the insurer's agent,²⁴ and usually is made very brief and indefinite, leaving much to be understood, as it would be scarcely possible under the circumstances to describe every article intended to be covered by the insurance with that degree of particularity which is ordinarily required in legal instruments. On account of these conditions attending the writing of the description, the courts are often more liberal in applying the rules of

²¹ See *Jones v. Insurance Co.*, *supra*.

²² *Penn Plate Glass Co. v. Spring Garden Ins. Co.*, 189 Pa. 255, 42 Atl. 138, 39 Am. St. Rep. 810.

²³ *Atkins v. Insurance Co.*, 5 Metc. (Mass.) 439, 39 Am. Dec. 692.

²⁴ In *Susquehanna Mut. Fire Ins. Co. v. Cusick*, 109 Pa. 157, the insurer's agent erroneously described the property in an insurance policy, which was signed by him and the insured. The court held that the company could not set up the misdescription as a defense in case of loss.

construction to the written terms used for such purpose than to the other parts of the policy. Every effort is made to discover what was the real intention of the parties as to the property to be covered by the insurance.²⁵ Where there is ambiguity in the terms of the description, parol testimony may be introduced to resolve it. And the insured is allowed to show by parol a custom or usage of business which both parties had in mind at the time of making the contract, when its effect is to render clear some doubtful term of the description.²⁶ Thus in *Harper v. Insurance Co.*,²⁷ insurance was placed upon a printing office and bookbindery. The policy contained a printed condition exempting the insurer from liability for any loss or damage by fire occasioned by camphene or other inflammable liquids. In the description of the property insured was found the phrase "privileged for a printing office, bindery, etc." The property was destroyed by a fire occasioned by the ignition of camphene kept by the insured for the purpose of cleaning their presses. It was held that a general usage could be shown as existing among printers to keep camphene in their shops, and that such usage was necessary to the conduct of the business. It was therefore held that the words quoted from the description, when explained by the usage, negated the provision exempting the insurer from loss by reason of the camphene.

The words of description are ordinarily intended merely to designate the subject of the insurance, and not intended as warranties.²⁸ Therefore, as we have already seen, the mere description of a building insured as a dwelling house or as a barn does not amount to a warranty that the building shall continue to be used as a dwelling house or barn.²⁹

Description of Real Property.

In construing the words used descriptive of a building insured, the greatest liberality is shown by the courts in giving effect to the insurance. In view of the custom of insurance agents to examine buildings before writing policies upon them, and since a mistake as to the identity

²⁵ *Maisel v. Fire Ass'n*, 59 App. Div. 461, 69 N. Y. Supp. 181.

²⁶ In *Ackley v. Insurance Co.*, 25 Mont. 272, 64 Pac. 665, the insured was allowed to show by parol a custom or usage of druggists to keep benzine, ether, and gasoline, notwithstanding a clause in the policy which said: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the * * * premises, benzine, * * * ether, * * * or gasoline."

²⁷ 22 N. Y. 441, *Richards, Ins. Cas.* 308.

²⁸ *Albion Lead Works v. Williamsburg City Fire Ins. Co. (C. C.)* 2 Fed. 479.

²⁹ *Cumberland Valley Mut. Protection Co. v. Douglas*, 58 Pa. 419, 98 Am. Dec. 298.

and character of the building is extremely unlikely, the courts are inclined to consider that the policy of insurance covers any building which the parties manifestly intended to insure, however inaccurate the description may be. Thus a policy insuring a "two-story brick building" was held to cover a building owned by the insured which was two stories in front, though only one in the rear, it being apparent such building was intended to be covered by the policy.³⁰ So a policy upon a "schoolhouse" was held sufficiently to identify the building insured in which a school was kept, although it was not an ordinary schoolhouse.³¹ Likewise the term "store" was held to be a sufficient description of a building used as a restaurant and bakery.³²

If, however, the description is so ambiguous in its terms as to make it uncertain whether it covers one or several buildings, the court will not go beyond a reasonable construction of the language used in order to fix a liability upon the insurer. Thus a policy insuring a "pottery building" was held not to cover a building adjacent to the pottery factory, which was used for the storage of pottery, as well as for other purposes distinct from pottery making.³³ Parol testimony cannot be introduced to substitute another building for the one described, on the ground that the substituted building was the one intended to be insured.³⁴ The written description in the contract can be explained, but not ignored.

The description of a building always includes by implication all such fixtures and appurtenances as would pass with it under a deed of conveyance. Thus insurance upon a dwelling house also covers the furnace and boiler used for heating it.³⁵ Likewise insurance upon a storehouse was held to include the counters and shelves that were fixed to the building so as not to be easily removed.³⁶

Goods Held in Trust.

The property intended to be covered by insurance is often described as "held in trust" or "on commission," or "sold but not delivered," or by words of similar import. The courts are well agreed that these terms are not to be given their technical significance, but are to be

³⁰ Carr v. Insurance Co., 2 Mo. App. 466.

³¹ Garretson v. Insurance Co., 81 Iowa, 727, 45 N. W. 1047.

³² Richards v. Insurance Co., 60 Mich. 420, 27 N. W. 586.

³³ Forbes v. Insurance Co., 164 Mass. 402, 41 N. E. 656.

³⁴ Sanders v. Cooper, 115 N. Y. 279, 22 N. E. 212, 5 L. R. A. 638, 12 Am. St. Rep. 801, Richards, Ins. Cas. 385.

³⁵ West v. Insurance Co., 117 Iowa, 147, 90 N. W. 523.

³⁶ Capital City Ins. Co. v. Caldwell, 95 Ala. 77, 10 South. 355.

It was held in Tanenbaum v. Simon, 40 Misc. Rep. 174, 81 N. Y. Supp. 655, and Id., 84 App. Div. 642, 82 N. Y. Supp. 1116, that insurance on the "use and occupancy" of a building did not cover salesmen's wages or the profits of the business.

construed merely as meaning that the insured holds the goods as bailee, and not in his own right, and insures them as such.³⁷ Thus a carrier or warehouseman is deemed to hold goods in his possession in trust, and his insurance of the goods to their full value will inure to the benefit of the owners.³⁸ The description of goods as "not delivered" will also be construed liberally, in accordance with intention of parties. Thus lumber that had been sold and put in a separate place, under such circumstances as to constitute a technical delivery as between the parties, was held not to be "delivered" within the meaning of an insurance policy upon which the insurer was held liable.³⁹

A later provision of the standard policy expressly excluded from the operation of the contract property held in storage or for repairs. It is probable that this express limitation will go far to qualify the meaning of such general terms as "held in trust," etc., used in describing the property, but even this express limitation will yield to the manifest intention of the parties as derived from the written description to insure property held on storage or for repairs.

THE SUBJECT OF INSURANCE—LOCATION.

157. If the location of the property insured is given merely for purposes of description and identification, the insurance accompanies it when removed to other localities. But if the location is given as defining the risk assumed, the policy does not cover the property when removed elsewhere. The statement of location is, in most cases, construed as defining the risk.

In connection with the description of goods insured, most policies contain the statement that such goods are "contained in" some designated place. The standard policy uses the expression, "while located and contained as described herein, and not elsewhere." Much difficulty has been encountered by the courts in determining whether the statement of location of goods insured is intended by the parties as merely an additional item of description, for the purpose of securing

³⁷ California Ins. Co. v. Union Compress Co., 133 U. S. 387, 10 Sup. Ct. 365, 33 L. Ed. 730; Home Ins. Co. v. Baltimore Warehouse Co., 95 U. S. 527, 23 L. Ed. 868; Southern Cold Storage & Produce Co. v. A. F. Dechman (Tex. Civ. App.) 73 S. W. 545; Home Ins. Co. v. Favorite, 46 Ill. 263; Siter v. Morris, 13 Pa. 218; Hough v. Insurance Co., 36 Md. 398.

³⁸ California Ins. Co. v. Union Compress Co., supra; Southern Cold Storage & Produce Co. v. Dechman, supra; Smith v. Carmack (Tenn.) 64 S. W. 372. In this case it was also held that the insurance policy covered goods taken in storage subsequent to the issuance of the policy.

³⁹ Michigan Pipe Co. v. Michigan Fire & Marine Ins. Co., 92 Mich. 482, 52 N. W. 1070, 20 L. R. A. 277. But see Lockhart v. Cooper, 87 N. C. 149, 42 Am. Rep. 514.

more perfect identification, or whether it is given as defining the risk that is to be assumed by the insurer. It is plain that, if the statement of location of the goods is merely descriptive in character, a change of location will not affect the insurance; but that, if the location is given for the purpose of defining the risk, the insurance will not accompany the goods upon removal from the place stated. It is for the court to determine what was the intention of the parties in this respect, in case the words used do not make it clear. The language of the standard policy, however, excludes any question of construction by the use of the expression "and not elsewhere," the language clearly indicating that the goods will not be protected if removed.⁴⁰

The cases construing those policies that do not contain the definite limitation of the standard form show much confusion. All are agreed that a removal of goods insured from the location described in the policy does not work a forfeiture of the policy, but merely suspends it until the goods are returned to the original location. Therefore the rule of construction that favors such interpretation of the words of the contract as will avoid a forfeiture does not apply in these instances. So that, when the goods are destroyed in a place different from that described in the policy, it is difficult to state what is the weight of authority as to the insurer's liability. While the cases are confused, there is yet found running through them the principle indicated in the black-letter text above, viz., that the insurer will not be liable for the goods as removed, if such removal would impose upon the insurer a risk he had not intended to assume. In determining whether the parties intended that the insurance should cover the property only in the location described, all the circumstances attending the making of the contract, the knowledge of the parties as to the use to which such property was customarily put, and the known intention of the insured as to that use, must all be considered. Thus in *Niagara Fire Ins. Co. v. Elliott*,⁴¹ where the property insured included, among other things, carriages and other vehicles described as contained in "the frame metal building * * * occupied as a livery and sales stable," it was held that the insurer was liable for the loss of three of the carriages so described, which, at the time of their destruction by fire, were in a repair shop some distance from the livery stable. This decision, which is manifestly correct, rested upon the theory that the insurer, knowing the use to which livery carriages are put, and that such use must necessarily cause them to be frequently removed

⁴⁰ *British America Assur. Co. v. Miller*, 91 Tex. 414, 44 S. W. 60, 39 L. R. A. 545, 66 Am. St. Rep. 901; *Village of L'Anse v. Fire Ass'n of Philadelphia*, 119 Mich. 427, 78 N. W. 465, 43 L. R. A. 838, 75 Am. St. Rep. 410. But see *De Graff v. Insurance Co.*, 38 Minn. 501, 38 N. W. 696, 8 Am. St. Rep. 685.

⁴¹ 85 Va. 962, 9 S. E. 694, 17 Am. St. Rep. 115.

from the livery stable, must have intended to insure them wherever they might happen to be in connection with the business of the insured.⁴² So, where an oil tank was insured as being located in a certain place, it was held to be still covered by the policy, although at the time of the fire it was in a different place, whither it had been carried by a flood.⁴³ Insurance upon a horse described in the policy as being in a certain barn will reasonably be construed to protect the owner while the horse is in use outside of the barn as well as when he is in the location described in the policy.⁴⁴

But when the property is of such a character that its use does not necessitate its removal from the place described as its location, the court will infer that the intention of the parties was that the statement of location should be a characterization of the risk.⁴⁵ Thus, where a stock of goods is insured as contained in a certain building, it will not be covered by the policy when removed to another place.⁴⁶ Likewise the insured cannot be allowed to recover upon a policy insuring certain furniture as being in a specified dwelling, when the loss has been suffered when the furniture was in another building.⁴⁷

Loss During and After Removal.

It is held that, when consent has been obtained for the removal of goods, they are not protected while in transit;⁴⁸ but they are protected in the former location, if they are destroyed before removal, even though consent has been given for their removal. The standard form

⁴² To the same effect, see *McCluer v. Insurance Co.*, 43 Iowa, 349, 22 Am. Rep. 249; *Longueville v. Assurance Co.*, 51 Iowa, 553, 2 N. W. 394, 33 Am. Rep. 146; *McKeesport Mach. Co. v. Ben Franklin Ins. Co.*, 173 Pa. 53, 34 Atl. 16. And see *Kratzenstein v. Assurance Co.*, 116 N. Y. 54, 22 N. E. 221, 5 L. R. A. 799, construing a policy on a commercial traveler's clothes and outfit. *London & L. Fire Ins. Co. v. Graves*, 4 Ky. Law Rep. 706. But see *BRADBURY v. INSURANCE SOC.*, 80 Me. 396, 15 Atl. 34, 6 Am. St. Rep. 219; *Green v. Insurance Co.*, 91 Iowa, 615, 60 N. W. 189.

⁴³ *WESTERN & A. PIPE LINES v. HOME INS. CO.* (1891) 145 Pa. 346, 22 Atl. 665, 27 Am. St. Rep. 703. Also, see *Farrell v. Insurance Co.*, 66 Mo. App. 153.

⁴⁴ *Haws v. Fire Ass'n*, 114 Pa. 431, 7 Atl. 159. Compare *Haws v. Insurance Co.*, 130 Pa. 113, 15 Atl. 915, 18 Atl. 621, 2 L. R. A. 52; *De Graff v. Insurance Co.*, 38 Minn. 501, 38 N. W. 696, 8 Am. St. Rep. 685; *American Cent. Ins. Co. v. Haws*, 20 Wkly. Notes Cas. 370. But see *Farmers' Mut. Fire Ins. Ass'n v. Kryder*, 5 Ind. App. 430, 31 N. E. 851, 51 Am. St. Rep. 284.

⁴⁵ *Lakings v. Insurance Co.*, 94 Iowa, 476, 62 N. W. 783, 28 L. R. A. 70; *Annapolis & E. R. Co. v. Baltimore Fire Ins. Co.*, 32 Md. 37, 3 Am. Rep. 112; *English v. Insurance Co.*, 55 Mich. 273, 21 N. W. 340, 54 Am. Rep. 377.

⁴⁶ *English v. Insurance Co.*, 55 Mich. 273, 21 N. W. 340, 54 Am. Rep. 377.

⁴⁷ *Lyons v. Insurance Co.*, 14 R. I. 109, 51 Am. Rep. 364, *Richards, Ins. Cas.* 447; *Towne v. Fire Ass'n*, 27 Ill. App. 433; *Green v. Insurance Co.*, 91 Iowa, 615, 60 N. W. 189.

⁴⁸ *Goodhue v. Insurance Co.*, 184 Mass. 41, 67 N. E. 645.

also contains this clause with reference to the right of removal: "If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not." Such a provision is manifestly wise and fair, and removes much difficulty in adjusting losses under such circumstances.

THE INTEREST OF THE INSURED.

158. **STATEMENT**—The requirement that the interest of the insured in the property shall be truly stated is satisfied by a statement of the quality of that interest. The quantity need not be stated, nor need the title be given.
159. **UNCONDITIONAL AND SOLE OWNERSHIP** exists in the insured when his interest in the property is vested in fee, not subject to condition or contingency, and not held jointly with others. Such ownership may exist in merely equitable interests, and is not negated by incumbrances.
160. The condition invalidating the insurance, if the building insured is on ground not owned by the insured in fee simple, will be satisfied if the interest of the insured in the land is equal in extent to a fee, even though it be only equitable or subject to an incumbrance.

The value of the interest of the insured, as a general rule, measures the degree of care which he will bestow upon the property, and also the effort which he will make for its preservation in case it becomes endangered. The relation between the amount of insurance and the value of the interest insured has also a most important bearing upon the good faith of the insured in applying for the policy. The insurer is therefore justified in desiring full information as to the nature, extent, and value of the insured's interest in the property to be covered by the policy at the time of the application, and also in stipulating for information with reference to any changes that may take place in that interest during the currency of the policy. Accordingly the courts hold that conditions of the policy making its validity dependent upon giving correct information concerning such interest are reasonable and enforceable.

The courts do not, however, require that a person shall be skilled in the science of conveyancing in order to be able to make a valid contract of insurance upon his property. Therefore the language both of the description of the interest insured and of the conditions of the policy with reference to such interest is construed, not technically, but with the consistent purpose of giving the expressions used such meaning as was intended by the parties at the time the contract was made. The court will put itself in the position of an unskilled person required to describe his interest, and will regard that description as sufficient if it substantially describes the interest which the insured in good faith believed that he possessed, even though the language used was technically inaccurate. Before the adoption of the standard form of policy the conditions with reference to the statement of the insured's interest varied greatly in different policies, both in regard to language used and the apparent purpose in view. The draftsman of the standard policy, in formulating the conditions of that instrument, had in mind the experience of underwriters under the numerous preceding forms of policies, and also the decisions of the court construing them. Consequently the interest conditions of the standard policy are apparently as just to both parties and as accurately expressed as any that could be devised. The conditions intended to secure a true statement of the insured's interest at the time of the issuance of the policy are: "This entire policy shall be void * * * if the interest of the insured in the property be not truly stated herein; * * * or unless otherwise provided by agreement indorsed hereon or added hereto; * * * or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage." Other conditions requiring notice of a change in this interest will be construed later.

Statement of the Insured's Interest.

Without this requirement there would be no duty incumbent on the insured to state the character of his interest, provided he had an interest that was insurable. The condition above quoted, however, requires a description of that interest, and it seems that the condition applies even to those policies that are issued without a previous application; for, if the policy does not elsewhere contain a statement of the character of the interest, it will be implied, by reference to the later condition, that the interest is represented as being sole and unconditional.⁴⁹ But the condition that the interest of the insured should

⁴⁹ *Wilcox v. Insurance Co.*, 85 Wis. 193, 55 N. W. 188; *Crikelafr v. Insurance Co.*, 168 Ill. 309, 48 N. E. 167, 61 Am. St. Rep. 119; *Fitchburg Sav. Bank v. Amazon Ins. Co.*, 125 Mass. 431; *Wierengo v. Insurance Co.*, 98

be truly stated does not require anything more than a statement of the quality of that interest; as, for instance, whether the property is held as owner, bailee, mortgagee, or trustee.⁵⁰ It does not require that the quantity of the interest shall be given or its value. Therefore a true statement of the insured's interest need not include a discovery of any incumbrances or liens that exist upon the land.⁵¹ Neither is the insured under this condition required to state whether his interest is legal or equitable, for it is well recognized that "interest" is a far broader term than "title."⁵²

Sole and Unconditional Ownership.

The purpose of the insurer in requiring information as to whether the interest of the insured be other than unconditional and sole ownership is merely to enable him to determine whether, in case of destruction of the property, the whole loss would fall upon the insured, or whether it would be borne partly by the owners of other interests. Therefore, in the midst of the numerous confusing decisions, we may discover the consistent purpose, not always avowed, to hold that if the interest of the insured at the time the policy was procured was of such a character as would impose upon him, directly or indirectly, the whole burden of loss consequent upon the destruction of the insured premises, that interest will satisfy the condition of sole and unconditional ownership.⁵³ Thus, it has been held that a merely

Mich. 621, 57 N. W. 833; *Smith v. Insurance Co.*, 17 Pa. 253, 55 Am. Dec. 546; *Pennsylvania Ins. Co. v. Gottsman's Adm'rs*, 48 Pa. 151; *Brown v. Insurance Co.*, 86 Ala. 189, 5 South. 500. But see contra, *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 24 S. E. 393, 53 Am. St. Rep. 846, Wood, Ins. § 162.

⁵⁰ *Clay Fire & Marine Stock Ins. Co. v. Beck*, 43 Md. 353; *DOLLIVER v. INSURANCE CO.*, 128 Mass. 315, 35 Am. Rep. 378; *Wooddy v. Insurance Co.*, 31 Grat. (Va.) 362, 31 Am. Rep. 732; *De Armand v. Insurance Co. (C. C.)* 28 Fed. 603; *Ellis v. Insurance Co. (C. C.)* 32 Fed. 646.

⁵¹ *De Armand v. Insurance Co. (C. C.)* 28 Fed. 603; *Friezen v. Insurance Co. (C. C.)* 30 Fed. 352; *Ellis v. Insurance Co. (C. C.)* 32 Fed. 646; *Carrigan v. Insurance Co.*, 53 Vt. 418, 38 Am. Rep. 687; *Alamo Fire Ins. Co. v. Lancaster*, 7 Tex. Civ. App. 677, 28 S. W. 126; *Manhattan Fire Ins. Co. v. Weill*, 28 Grat. (Va.) 339, 26 Am. Rep. 364.

⁵² *WALRADT v. INSURANCE CO.*, 136 N. Y. 375, 32 N. E. 1063, 32 Am. St. Rep. 752; *GIBB v. INSURANCE CO.*, 59 Minn. 267, 61 N. W. 137, 50 Am. St. Rep. 405; *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 24 S. E. 393, 53 Am. St. Rep. 846.

⁵³ "The object of the stipulation in the policy was to protect the defendant against taking risks beyond the value of the interest insured, so that the insured would use all reasonable precautions to avoid the destruction of the property." *Security Ins. Co. v. Kuhn*, 207 Ill. 166, 69 N. E. 822. *IMPERIAL FIRE INS. CO. v. DUNHAM*, 117 Pa. 460, 12 Atl. 663, 2 Am. St. Rep. 636; *DUPREAU v. INSURANCE CO.*, 76 Mich. 615, 43 N. W. 585, 5 L. R. A. 671; *Pennsylvania Fire Ins. Co. v. Dougherty*, 102 Pa. 568; *Hartford Fire Ins. Co. v. Keating*, 86 Md. 130, 38 Atl. 29, 63 Am. St. Rep. 499; *AETNA FIRE INS. CO. v. TYLER*, 16 Wend. (N. Y.) 396, 30 Am. Dec. 90; *Lebanon Mut. Ins. Co. v. Erb*, 112 Pa. 149, 4 Atl. 8.

equitable interest may satisfy this condition as well as if it were legal;⁵⁴ that a vendee, whether in possession or not, under a binding contract for the purchase of land, owns it unconditionally.⁵⁵ It is even held that possession with claim of ownership under a parol contract is sufficient to constitute unconditional ownership,⁵⁶ although it would seem to be otherwise if the possession was held under a voluntary parol agreement to convey.⁵⁷ It is not necessary that the title claimed shall be valid, provided the claim of interest is bona fide.⁵⁸ The insured, in stating that his ownership is unconditional, should not be held to make a warranty of title. It seems, however, that if the title under which the insured claims ownership is void on its face the condition is broken.⁵⁹ This certainly is true if the insured has reason to know that it is void.⁶⁰

The expression "unconditional ownership" means ownership in fee, and any less interest, such as an estate by the curtesy, or other life estate, or a term of years, does not satisfy the condition.⁶¹ The own-

⁵⁴ *Matthews v. Insurance Co.*, 115 Wis. 272, 91 N. W. 675; *Loventhal v. Insurance Co.*, 112 Ala. 108, 20 South. 419, 33 L. R. A. 253, 57 Am. St. Rep. 17; *DUPREAU v. INSURANCE CO.*, 76 Mich. 615, 43 N. W. 585, 5 L. R. A. 671; *Ben Franklin Fire Ins. Co. v. Wilgus*, 88 Pa. 107; *North British & Mercantile Ins. Co. v. Estes*, 106 Tenn. 472, 62 S. W. 149, 52 L. R. A. 915, 82 Am. St. Rep. 892.

In *Security Ins. Co. v. Kuhn*, 207 Ill. 166, 69 N. E. 822, it was held that where the interest of the insured was a life estate in the property or its proceeds, united with the absolute right as an active testamentary trustee to dispose of the same as she saw fit for the purposes of the trust, the insured was the sole and unconditional owner in fee simple within the meaning of this clause of the standard policy. *Lebanon Mut. Ins. Co. v. Erb*, 112 Pa. 149, 4 Atl. 8.

⁵⁵ *Matthews v. Insurance Co.*, 115 Wis. 272, 91 N. W. 675; *Pennsylvania Fire Ins. Co. v. Hughes*, 108 Fed. 497, 47 C. C. A. 459.

⁵⁶ *Milwaukee Mechanics' Ins. Co. v. B. S. Rhea & Son*, 123 Fed. 9, 60 C. C. A. 103. See, also, *Pelton v. Insurance Co.*, 77 N. Y. 605; *Wainer v. Insurance Co.*, 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598.

⁵⁷ *Wineland v. Insurance Co.*, 53 Md. 276; *MILLER v. INSURANCE CO.*, 46 Mich. 463, 9 N. W. 493.

⁵⁸ *Haider v. Insurance Co.*, 67 Minn. 514, 70 N. W. 805.

⁵⁹ *Liverpool & London & Globe Ins. Co. v. Cochran*, 77 Miss. 348, 26 South. 932, 78 Am. St. Rep. 524.

⁶⁰ *Liverpool & London & Globe Ins. Co. v. Cochran*, 77 Miss. 348, 26 South. 332, 78 Am. St. Rep. 524.

⁶¹ *Hartford Fire Ins. Co. v. Keating*, 86 Md. 130, 38 Atl. 29, 63 Am. St. Rep. 499. The court thus stated the law: "To be 'unconditional and sole' the interest must be completely vested in the assured, not contingent or conditional, nor for life or years only, nor in common, but of such a nature that the insured must stand the entire loss if the property is destroyed. And this is so whether the title was legal or equitable." See, also, *Garver v. Insurance Co.*, 69 Iowa, 202, 23 N. W. 555; *Security Ins. Co. v. Mette*, 27 Ill. App. 324; *IMPERIAL FIRE INS. CO. v. DUNHAM*, 117 Pa. 460, 12 Atl. 663.

ership is not unconditional when the insured's title contains within itself a contingency or condition of defeasance;⁸² but, as shown above, an outstanding adverse claim is not such a condition upon the insured's interest as makes his ownership conditional. But where a mortgagee took an absolute conveyance from the mortgagor, making at the same time a secret agreement to reconvey upon payment of the debt intended to be secured, it was held that insurance procured by the pretended owner was void by reason of the breach of this condition.⁸³ In *Stowell v. Clark*,⁸⁴ however, the New York court held that, where the vendee of certain personalty had agreed to resell to the vendor in case of failure to pay any of the purchase notes outstanding, the interest of such vendee was nevertheless properly described as unconditional ownership. So, in Kentucky it has recently been held that a condition in purchase bonds given by the vendee of realty, securing to the vendor the right of re-entry in case of nonpayment, did not render insurance procured by the vendee invalid as a breach of this clause requiring sole and unconditional ownership.⁸⁵

Incumbrances not Considered as Conditions.

It has long been settled that the existence of a mortgage or other incumbrance, voluntary or involuntary, does not constitute a breach of the condition of unconditional and sole ownership,⁸⁶ inasmuch as

2 Am. St. Rep. 686; *Woodruff, Ins. Cas.* 152; *Brown v. Insurance Co.*, 86 Ala. 189, 5 South. 500; *Liverpool & London & Globe Ins. Co. v. Cochran*, 77 Miss. 348, 26 South. 932, 78 Am. St. Rep. 524; *Southwick v. Insurance Co.*, 133 Mass. 457; *Messelback v. Norman*, 46 Hun. 414; *Dwelling House Ins. Co. v. Dowdall*, 49 Ill. App. 33; *Collins v. Insurance Co.*, 44 Minn. 440, 46 N. W. 906.

⁸² *Hartford Fire Ins. Co. v. Keating*, 86 Md. 130, 38 Atl. 29, 63 Am. St. Rep. 499. See, also, *Dwelling House Ins. Co. v. Dowdall*, 49 Ill. App. 33. *ROHRBACH v. INSURANCE CO.*, 62 N. Y. 47, 20 Am. Rep. 451; *Southwick v. Insurance Co.*, 133 Mass. 457.

⁸³ *Farmers' & Merchants' Ins. Co. v. Hahn (Neb.)* 96 N. W. 255 (upon rehearing). But it has been held otherwise as to a creditor vendee of personalty in possession. *Carey v. Insurance Co.*, 92 Wis. 538, 66 N. W. 693.

⁸⁴ 171 N. Y. 673, 64 N. E. 1125, affirming 47 App. Div. 626, 62 N. Y. Supp. 155.

⁸⁵ *Scottish Union & Nat. Ins. Co. v. Strain*, 70 S. W. 274, 24 Ky. Law Rep. 958.

⁸⁶ "Indeed, the authorities are practically unanimous to the effect that an incumbrance is not an estate in or title to property, within the meaning of the provision that, if the interest of the insured be other than an unconditional or sole ownership, the policy shall be void. To the contrary, an incumbrance constitutes a mere lien upon property, which may be discharged at any time by payment of the sum for which the lien attaches." *Union Assur. Soc. v. Nalls*, 101 Va. 613, 44 S. E. 896.

"This condition did not have reference to the legal title, but to the interest of the insured in the property, and was not a warranty against liens and incumbrances. The interest of the insured in the property was, and con-

the destruction of the property would not in any wise discharge the debt secured by the lien upon it. The whole loss, in case of destruction of the mortgaged property, would fall upon the mortgagor, which would bring the case within the general rule of construction first stated above. But since the incumbrance upon the property insured does not fasten any lien upon the proceeds of insurance upon that property, the owner of heavily mortgaged property is tempted to transform his burdened property into unincumbered insurance money. On this account insurance policies frequently require that the existence of any sort of lien or incumbrance upon the insured property shall be disclosed.

By requiring that the interest shall be sole, the insurer intends to prevent a co-tenant from insuring, without his consent, property held jointly with others. Consequently any sort of joint ownership, whatever be its legal characteristics, will defeat a policy issued to any one of the joint tenants, unless this condition is waived.⁸⁷

Chattel Mortgages.

The standard policy requires incumbrances to be disclosed only in case the property insured is personalty, it being probably considered that the perishable nature of personalty renders the existence of a secret mortgage peculiarly hazardous.

Following the same rule of liberal construction⁸⁸ that obtains in all cases affecting the provisions of insurance policies, the courts will not hold that the condition against chattel mortgages is violated unless the transaction complained of is technically a mortgage. A lien of some other character is not sufficient.⁸⁹

tinued to be, unconditional and sole ownership, notwithstanding the mortgage they had given upon it." *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 24 S. E. 393, 53 Am. St. Rep. 846. So, a tax lien does not render the ownership conditional. *McClelland v. Insurance Co.*, 107 La. 124, 31 South. 691; *Clay Fire & Marine Stock Ins. Co. v. Beck*, 43 Md. 358; *Friezen v. Insurance Co. (C. C.)* 30 Fed. 352; *Ellis v. Insurance Co. (C. C.)* 32 Fed. 646; *Carrington v. Insurance Co.*, 53 Vt. 418, 38 Am. Rep. 687; *Alamo Fire Ins. Co. v. Lancaster*, 7 Tex. Civ. App. 677, 28 S. W. 126; *Burlington Fire Ins. Co. v. Coffman*, 13 Tex. Civ. App. 439, 35 S. W. 406.

⁸⁷ *MILLER v. INSURANCE CO.*, 46 Mich. 463, 9 N. W. 493.

But joint ownership under such circumstances as to make this condition inapplicable will not avoid the policy; as, where oil in a tank, owned jointly by several persons, was insured by the plaintiff as his own and "held in trust," the condition was held not to apply to such insurance. *Grandin v. Insurance Co.*, 107 Pa. 26.

⁸⁸ A mortgage upon a part of the personalty insured is not sufficient to violate the condition. It must cover the whole. *North British & Mercantile Ins. Co. v. Freeman (Tex. Civ. App.)* 33 S. W. 1091; *Bills v. Insurance Co.*, 87 Tex. 547, 29 S. W. 1063, 29 L. R. A. 706, 47 Am. St. Rep. 121; *Phoenix Ins. Co. v. Lorenz (Ind. App.)* 29 N. E. 604.

⁸⁹ *Caplis v. Insurance Co.*, 60 Minn. 376, 62 N. W. 440, 51 Am. St. Rep.

It has been recently held in Virginia that the existence of a chattel mortgage at the time of the issue of the policy does not constitute a breach of this condition when the policy was issued without requiring previous application, and without making inquiries of the insured as to the existence of incumbrances.⁷⁰ Although the court says that this doctrine commends itself to the judicial mind, it would seem that both the weight of authority and sound reason are opposed to it.⁷¹

Insured Building on Ground not Owned in Fee.

The condition invalidating insurance upon a building on ground not owned in fee by the insured is construed in the same spirit as the other conditions affecting the insured's interest, discussed above. The insured will be deemed to be the owner in fee simple if his interest in the land is without condition or limitation, even though he may not have the legal title.⁷² The condition is not violated if the estate of the insured is subject to an outstanding lease,⁷³ since a leasehold is but a chattel interest, and does not negative the existence of the fee simple in the lessor. The Kentucky court has even gone so far as to hold that where the building was situated upon land in which the insured had only a one-fourth undivided interest, it could be said truthfully to be on land owned by the insured in fee, since in a partition suit that portion of the land improved by him would be set off to the insured.⁷⁴

535; *Laird v. Littlefield*, 164 N. Y. 597, 58 N. E. 1089. In the last case the mortgage debt had been paid, but the mortgage not released. The condition was held not to be broken, but a deed of trust on insured personalty is held to violate the condition against chattel mortgages. *Hunt v. Insurance Co.*, 20 App. D. C. 48.

⁷⁰ *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 24 S. E. 393, 53 Am. St. Rep. 846; *Union Assur. Soc. v. Nalls*, 101 Va. 613, 44 S. E. 896.

⁷¹ *Wilcox v. Insurance Co.*, 85 Wis. 193, 55 N. W. 188; *Crikelair v. Insurance Co.*, 168 Ill. 309, 43 N. E. 167, 61 Am. St. Rep. 119; *Fritchburg Sav. Bank v. Amazon Ins. Co.*, 125 Mass. 431; *Wierengo v. Insurance Co.*, 98 Mich. 621, 57 N. W. 833; *Smith v. Insurance Co.*, 17 Pa. 253, 55 Am. Dec. 546; *Pennsylvania Ins. Co. v. Gottsman's Adm'rs*, 48 Pa. 151; *Brown v. Insurance Co.*, 86 Ala. 189, 5 South. 500.

⁷² *Swift v. Insurance Co.*, 18 Vt. 305; *Elllott v. Insurance Co.*, 117 Pa. 548, 12 Atl. 676, 2 Am. St. Rep. 703; *Lewis v. Insurance Co. (C. C.)* 29 Fed. 496. Nor is this condition of the policy broken if the building stands partly on a public street or partly on an adjoining lot in which insured has no interest. *Halder v. Insurance Co.*, 67 Minn. 514, 70 N. W. 805.

⁷³ *DOLLIVER v. INSURANCE CO.*, 128 Mass. 315, 35 Am. Rep. 378.

⁷⁴ *Kenton Ins. Co. v. Wigginton*, 89 Ky. 330, 12 S. W. 668, 7 L. R. A. 81. See, also, *Security Ins. Co. v. Kuhn*, 207 Ill. 166, 69 N. E. 822.

CHANGE OF INTEREST, TITLE, OR POSSESSION.

161. This condition is intended to protect the insurer from any contingency that might increase the risk assumed by the insurer by decreasing the interest of the insured. Hence it is construed to include only such acts or events affecting the title of the insured as substantially change the quantity of his beneficial interest, immaterial modifications of interest, title, or possession being ignored.

"* * * If any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment or by voluntary act of the insured, or otherwise."⁷⁵

Purpose of this Condition.

Underwriters realize that any decrease in the value or extent of the interest insured after the issue of the policy will tend directly to increase the moral element in the risk, which is known to be a most important one. If by a subsequent decrease in the value of his interest covered by the policy the insured could, upon loss of his diminished interest, recover the value of his original interest, the probability of fire would undoubtedly be greater. Hence the aim of the underwriters has been to frame such a condition as will give them an opportunity to cancel any outstanding policy when the risk has been increased by reason of a change in the insured's interest.⁷⁶

Progressive Attempts to Carry Out This Purpose.

The first condition inserted in fire policies in the effort to accomplish this aim was one prohibiting the sale or alienation of the property. This condition was, however, construed to mean only a complete sale or alienation, and not to be broken so long as any interest whatever remained in the insured.⁷⁷ The underwriters then added to

⁷⁵ This condition is valid, and not opposed to public policy as in restraint of alienation. *Findlay v. Insurance Co.*, 74 Vt. 211, 52 Atl. 429, 93 Am. St. Rep. 885.

⁷⁶ See an excellent statement of the rationale of this condition in *Cottingham v. Insurance Co.*, 90 Ky. 439, 14 S. W. 417, 9 L. R. A. 627.

The object of the provision is that the insured shall have no greater motive to destroy, or less interest in watching and guarding, the property insured. *German Ins. Co. v. Gibe*, 59 Ill. App. 614. The spirit and intention of the clause is to guard against any moral hazard involved in changed relations to the insured property. *Rosenstein v. Insurance Co.*, 79 App. Div. 481, 79 N. Y. Supp. 736. *FARMERS' & MERCHANTS' INS. CO. v. JENSEN*, 56 Neb. 284, 76 N. W. 577, 44 L. R. A. 861; *Ayres v. Insurance Co.*, 17 Iowa, 176, 85 Am. Dec. 553.

⁷⁷ *Cowan v. Insurance Co.*, 40 Iowa, 551, 20 Am. Rep. 583; *Hitchcock v. VANCE INS.*—29

this expression, which had been found insufficient, a prohibition of any "change of title." This, however, was construed to mean only a voluntary change of title, and to remain unbroken so long as the title of the insured remained unchanged, irrespective of any changes that might have taken place in his interest.⁷⁸ In order to escape the jealousy which the courts showed in applying the rule of strict construction against the insurer, many other expressions were devised and made use of in policies. One writer has collected a list of some two hundred varying conditions against alienation.

The Broad Language of Alienation Clause in the Standard Policy.

In the effort to compel the discovery of any change whatever in the interest of the insured which would tend to increase the risk, the draftsman of the standard policy broadened the language of the condition so as to make it include not only a change in title and possession, but also a change in "interest," the broadest property term that can be used, and expressly included involuntary changes in interest as well as those that are voluntary, while expressly excepting changes due to the death of the insured.⁷⁹ Some courts have taken the view that the comprehensive terms of this condition necessarily include any changes whatever in the insured's interest,⁸⁰ but the majority of the courts, induced either by precedents construing older, less comprehensive forms, or moved by a determination not to permit a merely technical defeat of a contract entered into in good faith by the insured, have shown a strong inclination to except from the operation of this condition such immaterial changes of interest as do not diminish the value of that interest or increase the moral hazard of the risk. Thus it has been held that the appointment of a receiver⁸¹ does not constitute such a change of interest as violates this condition, nor does

Insurance Co., 26 N. Y. 68; *HOFFMAN v. INSURANCE CO.*, 32 N. Y. 405, 88 Am. Dec. 337; *Stetson v. Insurance Co.*, 4 Mass. 330, 3 Am. Dec. 217 (1808); *Clinton v. Insurance Co.*, 176 Mass. 486, 57 N. E. 938, 50 L. R. A. 833, 79 Am. St. Rep. 325, and cases cited.

⁷⁸ *Thompson v. Insurance Co.*, 136 U. S. 287, 10 Sup. Ct. 1019, 34 L. Ed. 408; *Rhode Island Underwriters' Ass'n v. Monarch*, 98 Ky. 305, 32 S. W. 959; *New Orleans Ins. Co. v. Gordon*, 68 Tex. 144, 3 S. W. 718; *Georgia Home Ins. Co. v. Bartlett*, 91 Va. 305, 21 S. E. 476, 50 Am. St. Rep. 832.

⁷⁹ *Lapplin v. Insurance Co.*, 58 Barb. (N. Y.) 325; *Hine v. Woolworth*, 93 N. Y. 75, 45 Am. Rep. 176; *Sherwood v. Insurance Co.*, 73 N. Y. 447, 29 Am. Rep. 180; *Virginia Fire & Marine Ins. Co. v. Thomas*, 90 Va. 658, 19 S. E. 454.

⁸⁰ *Lapplin v. Insurance Co.*, 58 Barb. (N. Y.) 325; *Hine v. Woolworth*, 93 N. Y. 75, 45 Am. Rep. 176; *Sherwood v. Insurance Co.*, 73 N. Y. 447, 29 Am. Rep. 180.

⁸¹ *Georgia Home Ins. Co. v. Bartlett*, 91 Va. 305, 21 S. E. 476, 50 Am. St. Rep. 832. So where a receiver is appointed in bankruptcy proceedings *Fuller v. Insurance Co.*, 184 Mass. 12, 67 N. E. 879.

a change⁸² of receivers, when the policy was procured by a former receiver.

So other clauses of the policy, especially the description of the risk, may, when read in connection with the condition against alienation, exclude from its operation a case apparently falling within its terms. Thus when insurance is granted upon a fluctuating stock of goods, it is plain that the parties contemplate buying and selling of the property insured, and the consequent changes of interest.⁸³ Likewise insurance taken "for the account of whom it may concern" was held by the Supreme Court of the United States⁸⁴ not to be avoided by a subsequent change of interest in the insured despite the presence of the standard alienation clause. The written terms quoted clearly showed an intention that the subject of insurance should be afterwards transferred, and, being in writing, prevailed over the repugnant printed alienation clause.

Incumbrances.

Much conflict exists among the decided cases as to whether the giving of a mortgage amounts to a change of interest. It clearly does not amount to a change of title or possession under the older forms,⁸⁵ but some of the cases have held that it does amount to a change of interest, and therefore avoids the standard policy unless consented to by the insurer.⁸⁶ By the clear weight of authority, however, it is held that the giving of a deed of trust or mortgage does not make such a substantial change in the interest of the insured as to constitute a breach of the alienation clause.⁸⁷ In a recent Wisconsin case it was even held that the condition was not violated by an absolute conveyance made by the insured, when he received from the grantee a separate

⁸² *Thompson v. Insurance Co.*, 136 U. S. 287, 10 Sup. Ct. 1019, 34 L. Ed. 408.

⁸³ *Wolfe v. Insurance Co.*, 39 N. Y. 49; *LANE v. INSURANCE CO.*, 12 Me. 44, 28 Am. Dec. 150.

⁸⁴ *Hagan v. Insurance Co.*, 186 U. S. 423, 22 Sup. Ct. 862, 46 L. Ed. 1229.

⁸⁵ *Aurora Fire Ins. Co. v. Eddy*, 55 Ill. 213; *Hoose v. Insurance Co.*, 84 Mich. 309, 47 N. W. 587, 11 L. R. A. 340; *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 24 S. E. 393, 53 Am. St. Rep. 846.

⁸⁶ *East Texas Fire Ins. Co. v. Clarke*, 79 Tex. 23, 15 S. W. 166, 11 L. R. A. 293; *Fireman's Fund Ins. Co. v. Barker*, 6 Colo. App. 535, 41 Pac. 513; *Olney v. Insurance Co.*, 88 Mich. 94, 50 N. W. 100, 13 L. R. A. 684, 26 Am. St. Rep. 281.

⁸⁷ *Wolf v. Insurance Co.*, 115 Wis. 402, 91 N. W. 1014. See, also, to the same effect, *Sun Fire Office v. Clark*, 53 Ohio St. 414, 42 N. E. 248, 38 L. R. A. 562; *LAMPASAS HOTEL & PARK CO. v. PHOENIX INS. CO.* (Tex. Civ. App.) 38 S. W. 361; *Same v. Home Ins. Co.*, 17 Tex. Civ. App. 615, 43 S. W. 1081; *Peck v. Insurance Co.*, 16 Utah, 121, 51 Pac. 255, 67 Am. St. Rep. 600; *Aetna Ins. Co. v. Jacobson*, 105 Ill. App. 283.

written agreement to reconvey upon repayment of the debt, and only the deed of conveyance was recorded.⁸⁸

Although it can scarcely be denied that the giving of a mortgage or deed of trust, even in those states where such an incumbrance is regarded merely as a lien, and not as an interest in the land, does work a substantial change in the equitable interest of the insured, yet it would seem that in view of all the circumstances usually surrounding such cases, and from a reading of all the conditions of the standard policy, these latter cases are probably correct. The policy nowhere expressly stipulates that mortgages on realty shall be disclosed, although such a requirement is made with reference to chattel mortgages, and to the commencement of proceedings to foreclose a mortgage on realty. Further, a later provision in the policy expressly recognizes the rights of the mortgagee in the property insured. These considerations would seem to indicate that the underwriters do not expect notice of incumbrances upon realty.

Executory Contracts of Sale.

On principle it would seem that when a binding contract has been made for the sale of insured real estate, so that any loss on account of destruction of the premises by fire would fall upon the vendee, such sale should be regarded as a substantial change of interest, avoiding a policy containing the alienation clause; and many of the cases so hold, especially when the purchase money has been paid and the vendee has gone into possession.⁸⁹ But it seems that the weight of authority holds that, so long as there is no change of possession, a mere executory sale, without conveyance of title, does not amount to such a change of interest as defeats the insurance.⁹⁰ Invalid conveyances which do not transfer title, as when possession of an undelivered deed has been fraudulently obtained, are held not to constitute a change of interest.⁹¹

⁸⁸ Wolf v. Insurance Co., 115 Wis. 402, 91 N. W. 1014. So a conveyance absolute in form, but intended as security for a contingent liability that never became fixed, was held not to be a change of interest such as to defeat insurance under this condition. Henton v. Insurance Co. (Neb.) 95 N. W. 670.

⁸⁹ Cottingham v. Insurance Co., 90 Ky. 439, 14 S. W. 417, 9 L. R. A. 627; Skinner & Sons' Ship-Building & Dry-Dock Co. v. Houghton, 92 Md. 68, 48 Atl. 85, 84 Am. St. Rep. 485; GIBB v. INSURANCE CO., 59 Minn. 267, 61 N. W. 137, 50 Am. St. Rep. 405; Germond v. Insurance Co., 2 Hun, 540.

⁹⁰ ERB v. INSURANCE CO., 98 Iowa, 606, 67 N. W. 583, 40 L. R. A. 845; Home Mut. Ins. Co. v. Tomkies & Co., 30 Tex. Civ. App. 404, 71 S. W. 812; Tiemann v. Insurance Co, 76 App Div. 5, 78 N. Y. Supp. 620; Boston & S. Ice Co. v. Royal Ins. Co., 12 Allen (Mass.) 381, 90 Am. Dec. 151; Trumbull v. Insurance Co., 12 Ohio, 305.

⁹¹ Hartford Fire Ins. Co. v. Warbritten, 66 Kan. 93, 71 Pac. 278; nor is policy avoided by a deed which is invalid because of grantor's mental in-

Transfers between Partners.

Much conflict is also found as to the effect of a transfer of interest between partners who are jointly insured. The general result of the decisions may, however, be stated to be this: When the transfer of interest is between the partners themselves, under such circumstances as not to increase the moral hazard by lessening the amount of possible loss to the insured, or by introducing a new personality into the contract, there is no violation of the alienation condition; but such a transfer by the partners as to decrease the value of the interest, or to bring another person into the partnership, is fatal to the insurance. Thus, where one partner sells out to another and retires from the firm, the insurer can scarcely complain of any increase in the risk.⁹² He has already accepted the remaining partner as a proper person to be insured, and the amount of interest still liable to destruction is exactly the same; therefore such a transfer is held not to avoid the policy. So it has been held that, where one of several partners assigns his interest in the firm to a stranger, no change of interest as to the partnership property results, because the title to the property, and also the beneficial ownership, is still in the firm, the assignee of the partner taking only a right to an accounting.⁹³ But when a new partner is taken into the firm, not only is the interest of the original members thereby diminished, but there is brought into the contract a person whom the insurer did not expect as a party to the contract. Hence it is held that such an enlargement of the membership of the firm defeats the insurance under the standard form of policy.⁹⁴

capacity. Gerling v. Insurance Co., 39 W. Va. 689, 20 S. E. 691. Nor by a deed to a homestead, void because signed by husband alone. German Fire Ins. Co. of Freeport v. York, 48 Kan. 488, 29 Pac. 586, 30 Am. St. Rep. 313.

⁹² WOOD v. INSURANCE CO., 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733; Virginia Fire & Marine Ins. Co. v. Thomas, 90 Va. 658, 19 S. E. 454; Virginia Fire & Marine Ins. Co. v. Vaughan, 88 Va. 835, 14 S. E. 754; Loeb v. Insurance Co., 38 Misc. Rep. 107, 77 N. Y. Supp. 106; Burnett v. Insurance Co., 46 Ala. 11, 7 Am. Rep. 581; Wilson v. Insurance Co., 16 Barb. (N. Y.) 511; Roby v. Insurance Co., 11 N. Y. St. Rep. 93; Texas Banking & Ins. Co. v. Cohen, 47 Tex. 406, 26 Am. Rep. 298. But, contra, see Shuggart v. Insurance Co., 55 Cal. 408; Hartford Fire Ins. Co. v. Ross, 23 Ind. 179, 85 Am. Dec. 452; HATHAWAY v. INSURANCE CO., 64 Iowa, 229, 20 N. W. 164, 52 Am. Rep. 438; WALTON v. INSURANCE CO., 116 N. Y. 326, 22 N. E. 443, 5 L. R. A. 677. Richards, Ins. Cas. 462. For an interesting case discussing this question, see Royal Ins. Co. v. Martin, 192 U. S. 149, 24 Sup. Ct. 247, 48 L. Ed. 385, recently decided on appeal from the Supreme Court of Porto Rico.

⁹³ WOOD v. INSURANCE CO., 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733; Hanover Fire Ins. Co. v. Lewis, 28 Fla. 209, 10 South. 297. Also, see Virginia Fire & Marine Ins. Co. v. Thomas, 90 Va. 658, 19 S. E. 454.

⁹⁴ Malley v. Insurance Co., 51 Conn. 222; Drennen v. Assurance Corp. (C. C.) 20 Fed. 657, reversed on other grounds in 113 U. S. 51, 5 Sup. Ct. 341, 28 L. Ed. 919.

Legal Process or Judgment.

A change of interest, title, or possession "by legal process or judgment" does not take place upon the mere institution of legal proceedings to subject the property insured to the satisfaction of some legal claim. Even levy of execution upon the property is not sufficient unless the officer takes actual possession.⁹⁶ The interest is not regarded as changed, when personalty is the subject of insurance, until there has been an actual sale and the passage of title to the purchaser.⁹⁷ Even the sale under judicial decree of realty does not constitute a change of interest, so long as the insured remains in possession and retains a right of redemption.⁹⁷ The mere rendering of a judgment, even when by statute it constitutes a lien upon realty, does not amount to a change of interest, which would result only upon judicial sale, properly confirmed, and the vesting of the perfected title in the purchaser.⁹⁸

FRAUD AND FALSE SWEARING.

162. The condition against fraud or false swearing extends the rule applicable to statements made in procuring the contract to all matters concerning the insurance, whether before or after loss. False statements made by the insured do not under this condition avoid the policy, unless they are knowingly false and fraudulent. Honest mistakes, however negligent, do not violate the condition.

As we have seen in a preceding chapter, any false or fraudulent conduct on the part of the insured, inducing the insurer to make a contract which otherwise he would decline, is sufficient to avoid the insurance, without stipulation to that effect. The clause of the standard policy making the entire contract void "in case of any fraud or false swearing by the insured touching any matter relating to this insurance

⁹⁶ *WALRADT v. INSURANCE CO.*, 136 N. Y. 375, 32 N. E. 1063, 32 Am. St. Rep. 752; *Phoenix Ins. Co. v. Lawrence*, 4 Metc. (Ky.) 9, 81 Am. Dec. 521; *McClelland v. Insurance Co.*, 107 La. 124, 31 South. 691; *WOOD v. INSURANCE CO.*, 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733; *Greenlee v. Insurance Co.*, 102 Iowa, 427, 71 N. W. 534, 63 Am. St. Rep. 455.

⁹⁷ *Rice v. Tower*, 1 Gray (Mass.) 426; *Walradt v. Insurance Co.*, 136 N. Y. 375, 32 N. E. 1063, 32 Am. St. Rep. 752, affirming 64 Hun, 129, 19 N. Y. Supp. 293.

⁹⁸ *Lodge v. Insurance Co.*, 91 Iowa, 103, 58 N. W. 1089; *WOOD v. INSURANCE CO.*, 78 Hun, 109, 29 N. Y. Supp. 250, affirmed 149 N. Y. 582, 44 N. E. 80, 52 Am. St. Rep. 733; *Hammel v. Insurance Co.*, 54 Wis. 72, 11 N. W. 349, 41 Am. Rep. 1.

⁹⁹ But a voluntary conveyance by a debtor to his son in order to prevent lien of anticipated judgment constitutes a change of interest. *Rosenstein v. Insurance Co.*, 79 App. Div. 481, 79 N. Y. Supp. 736; *Tefft v. Insurance Co.*, 19 R. I. 185, 32 Atl. 914, 61 Am. St. Rep. 761.

or the subject thereof, whether before or after a loss," extends this rule to all statements that may be made by the insured with reference to the insurance, either before the loss or after it.⁹⁹ This condition is reasonable and valid, and is intended to afford the insurer a remedy against false and fraudulent claims that may be made with reference to the value of property lost or damaged, and is especially aimed at falsehood and fraud in the statements required to be made in connection with notice and proof of loss. In order to enable the insurer to secure evidence of any fraud or false swearing that may have taken place in connection with insurance, the following term is inserted in the standard form: "The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made." This requirement is held to be valid, but will be enforced by the courts only when it is reasonably possible for the insured to comply with its requirements.¹⁰⁰

Fraudulent Overvaluation.

Overvaluation of property by the insured may take place either at the time of making the contract or at the time of submitting proofs of loss. In either event, under the conditions of the standard policy, such overvaluation, if fraudulent, entirely avoids the insurance.¹⁰¹ But the mere fact of overvaluation, even though it be great, is not alone sufficient proof of fraud. It must be alleged and clearly proved by the insurer that the insured, in overvaluing his property, did so knowingly and with fraudulent intent.¹⁰² Overvaluation may be due to a perfectly honest, though mistaken, estimate as to the real value of the property insured. It is a characteristic common to all men to value their property more highly than that of others, and this natural tendency in all men may be strengthened in some cases by reason of inexperience in business matters, or by association, giving to the property a "pretium affectionis," or even by a careless disposition.

⁹⁹ *Moore v. Insurance Co.*, 28 Grat. (Va.) 508, 26 Am. Rep. 373.

¹⁰⁰ *Liverpool & London & Globe Ins. Co. v. Kearney*, 180 U. S. 132, 21 Sup. Ct. 326, 45 L. Ed. 460; *Sneed v. Assurance Co.*, 73 Miss. 279, 18 South. 923.

¹⁰¹ *Baker v. Insurance Co.*, 31 Or. 41, 48 Pac. 699, 65 Am. St. Rep. 807; *Moore v. Insurance Co.*, 28 Grat. (Va.) 508, 26 Am. Rep. 373; *Phoenix Ins. Co. v. Pickel*, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 393; *TITUS v. INSURANCE CO.*, 81 N. Y. 410.

¹⁰² *Ermann v. Insurance Co.*, 35 La. Ann. 1095; *Daul v. Insurance Co.*, 35 La. Ann. 98; *Hilton v. Assurance Co.*, 92 Me. 272, 42 Atl. 412.

In no case will an honest overvaluation be sufficient to avoid the policy.¹⁰³ The question whether the overvaluation was honest or fraudulent is for the jury as a general rule,¹⁰⁴ although there may be in some cases such a disproportion between the real and stated values as to justify the court in declaring the existence of fraud.¹⁰⁵

In *Behrens v. Insurance Co.*,¹⁰⁶ it was held that a valuation of property, subsequently determined to be worth \$1,240, at \$2,000, was not under the circumstances fraudulent; but in a leading English case¹⁰⁷ *Cockburn, C. J.*, declared that the valuation of property, worth not more than £30, at £418, was fraudulent as a matter of law. In *Wisconsin*¹⁰⁸ it was held that valuing property worth \$2,000 at \$5,000 was not conclusively fraudulent, while in another English case¹⁰⁹ a valuation of property at twice its actual value was held to be conclusive proof of fraud. In order that overvaluation shall be regarded as fraudulent within the terms of this condition, it is generally held that it must be material, and such as to be injurious to the insurer. In accordance with this principle, even a gross overvaluation of property will not avoid the policy, where the actual value is greater than the amount of insurance.¹¹⁰

False Swearing and False Statement in Regard to the Loss.

In order that a false statement of value at the time of making the contract shall avoid the insurance, such statement must have been made with the fraudulent intent to injure the insurer.¹¹¹ But no such specific intent is necessary in order that a consciously false statement in connection with the proof of loss shall avoid the insurance. In accordance with the stipulation of the policy, the insurer is entitled to the exact truth with reference to the subjects of his interrogation, and any statement known by the insured to be false would absolutely defeat his claim to indemnity, even though he may have intended by the false statement not to injure the insurer in any wise, but to further some ulterior purpose of his own.¹¹²

¹⁰³ *First Nat. Bank v. Hartford Fire Ins. Co.*, 95 U. S. 673, 24 L. Ed. 563; *Miller v. Insurance Co. (C. C.)* 7 Fed. 649.

¹⁰⁴ *Levie v. Insurance Co.*, 163 Mass. 117, 39 N. E. 792; *Helbing v. Insurance Co.*, 54 Cal. 156, 35 Am. Rep. 72.

¹⁰⁵ *Levy v. Baillie*, 7 Bing. 349; *Chapman v. Pole*, 22 L. T. (N. S.) 306, *Richards, Ins. Cas.* 475.

¹⁰⁶ 64 Iowa, 19, 19 N. W. 838, *Richards, Ins. Cas.* 479.

¹⁰⁷ *Chapman v. Pole*, 22 L. T. (N. S.) 306, *Richards, Ins. Cas.* 475.

¹⁰⁸ *Dogge v. Insurance Co.*, 49 Wis. 501, 5 N. W. 889.

¹⁰⁹ *Levy v. Baillie*, 7 Bing. 349.

¹¹⁰ *Dogge v. Insurance Co.*, 49 Wis. 501, 5 N. W. 889; *Wolf v. Insurance Co.*, 43 Barb. (N. Y.) 400.

¹¹¹ *Huston v. Insurance Co.*, 100 Iowa, 402, 69 N. W. 674; *Home Ins. Co. of New York v. Mendenhall*, 164 Ill. 458, 45 N. E. 1078, 36 L. R. A. 374; *Atherton v. Assurance Co.*, 91 Me. 289, 39 Atl. 1006.

¹¹² *Clafin v. Insurance Co.*, 110 U. S. 96, 3 Sup. Ct. 507, 28 L. Ed. 76. See,

OTHER INSURANCE.

163. The purpose of the condition against other insurance is to prevent overinsurance. Hence the double insurance must cover the same interest, and not different interests that may exist in the same property, such as those of mortgagor and mortgagee. By the better authority the procuring of any other insurance on the same interest without the consent of the company, even though void on its face, constitutes a breach of the condition as found in the standard policy.

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

This condition is also intended to give the insurer control of the moral hazard involved in the risk assumed. In the absence of any condition of this kind, the insured can procure as many policies of insurance as the insurers are willing to issue. In no case, however, could the recovery by the insured in case of loss exceed the actual value of the property destroyed. But the well-known liberality of juries in fixing the value of property which can no more be seen imposes a great temptation upon dishonest persons, whose property is insured up to its full value or above it, to bring about its destruction; and the same conditions undoubtedly tend to lessen the care that may be exercised by the honest in preventing fire. In view of these facts, as amply demonstrated by experience as they are apparent to reason, the underwriters take every precaution to avoid overinsurance. In pursuance of this policy, the condition above quoted has been inserted in the standard form. It is clearly worded and certain in meaning, as well as being just and proper in its purpose. It should therefore be given full force and effect by the courts in accordance with its terms.¹¹³

also, *Northwestern Mut. Life Ins. Co. v. Montgomery*, 116 Ga. 799, 43 S. E. 79; *Virginia Fire & Marine Ins. Co. v. Vaughan*, 88 Va. 832, 14 S. E. 754. In this last case certain invoices were falsified by the insured. The undisputed proofs showed a loss far in excess of the insurance, so that the falsification could not possibly have injured the insurer or profited the insured. "However that may be," said the court, "the undisputed facts are that he swore to a loss in excess of the actual loss, and furnished false vouchers, for which no explanation has been offered. We must therefore infer that his sworn statements were known to him to be false, and, being upon a material matter, the law presumes that they were made with intent to deceive." In a second appeal of the same case, this holding was reaffirmed. See 46 S. E. 692.

¹¹³ But the courts will avoid a forfeiture when it is possible to do so. Thus, in *Stage v. Insurance Co.*, 76 App. Div. 509, 78 N. Y. Supp. 555, it was held that taking out a new policy in the place of an old one, that might have

And such has been the construction of the condition¹¹⁴ in all save a few jurisdictions, where there is a tendency to narrow its scope and defeat the plain intent of the condition by holding that subsequent insurance, which by its terms is absolutely void, does not constitute a breach of this condition.¹¹⁵

The Double Insurance must be upon the Same Interest.

The purpose of this condition, as stated above, makes it applicable only when the double insurance covers the same interest and the same risk at the same time, even though several insurances may be obtained upon the same property. The spirit of the condition is not violated if each separate insurance inures to the benefit of the holder of a distinct interest. Thus the interests of the mortgagor and the mortgagee are entirely separate. Insurance taken out independently by either will not inure to the benefit of the other. Hence both mortgagor and mortgagee may insure the same property without violating the condition against double insurance in the policy.¹¹⁶ The same thing is true of the life tenant and the remainderman,¹¹⁷ landlord and tenant,¹¹⁸ bailor and bailee, and other such persons holding separate interests in the same property.

But even when a policy which is issued to a person having a separate and distinct interest in the property is of such a form as to inure to the benefit of the owner of a different interest in that same property, insurance obtained upon this second interest will be double insurance. Thus where a carrier or warehouseman insures goods in his possession

been renewed, was not procuring "other insurance." In *Temple v. Assurance Co.*, 35 N. B. 171, it was held that the condition against other insurance was not broken by an application for other insurance if it was not issued, and no agreement had been reached between the insured and the other company at the time of the fire.

¹¹⁴ *Arnold v. Insurance Co.*, 106 Tenn. 529, 61 S. W. 1032; *Sugg v. Insurance Co.*, 98 N. C. 143, 3 S. E. 732; *Orient Ins. Co. v. Prather*, 25 Tex. Civ. App. 446, 62 S. W. 89.

¹¹⁵ *Phenix Ins. Co. v. Lamar*, 106 Ind. 513, 55 Am. Rep. 764. In *Gee v. Insurance Co.*, 55 N. H. 65, 20 Am. Rep. 171, it was stated, obiter, that the condition avoiding a policy in case of other invalid insurance was void as repugnant to the purpose of the contract. In *Stevens v. Insurance Co.*, 69 Iowa, 658, 29 N. W. 769, the second insurance was held valid, since the former policy had been avoided by a removal of the insured property before the issue of the policy in suit. In *Zinck v. Insurance Co.*, 60 Iowa, 266, 14 N. W. 792, it was held that the belief of the insured that no other valid insurance existed on his property was immaterial in a suit on the second policy, and that the first policy defeated the second.

¹¹⁶ *Home Ins. Co. v. Koob*, 68 S. W. 453, 24 Ky. Law Rep. 223, 58 L. R. A. 58; *Hartford Fire Ins. Co. v. Williams*, 11 C. C. A. 503, 63 Fed. 925; *Cronin v. Association*, 123 Mich. 277, 82 N. W. 45; *Breeyear v. Insurance Co.*, 71 N. H. 445, 52 Atl. 860.

¹¹⁷ *Franklin Marine & Fire Ins. Co. v. Drake*, 2 B. Mon. (Ky.) 47.

¹¹⁸ *Clemson v. Trammell*, 34 Ill. App. 414.

to the full extent of their value to protect his own interest and that of the owner, subsequent insurance taken out by the owner upon the same property will be "other insurance" within the meaning of this clause.¹¹⁹ The criterion in every case is whether the owner of a single interest may look to more than one policy for indemnity.¹²⁰

Double insurance procured without the knowledge or consent of the policy holder will not constitute a breach of this condition,¹²¹ but any subsequent act of the insured ratifying the unauthorized procurement of the second policy will operate to defeat the former.¹²²

On principle it would seem clear that, if a second insurance was procured upon any part of the property covered by the first policy, the condition would be broken, and such is the holding of the better authorities,¹²³ although there are cases which take the view that other insurance does not exist unless both policies cover identically the same subject-matter.¹²⁴

Construction of Older Forms of the Condition.

It will be observed that the condition against double insurance quoted above contains the clause "whether valid or not." This clause was not a part of the early conditions against double insurance, and was inserted in the standard policy for the purpose of avoiding the difficulty that had been experienced in the construction of those forms, which merely prohibited other insurance. Under such forms the courts held that the procuring of invalid insurance did not avoid existing policies containing a condition against other insurance, "other insurance" being

¹¹⁹ *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527, 23 L. Ed. 868.

¹²⁰ *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527, 23 L. Ed. 868; *Copeland v. Insurance Co.*, 96 Ala. 615, 11 South. 746, 38 Am. St. Rep. 134; *Westchester Fire Ins. Co. v. Foster*, 90 Ill. 121.

¹²¹ *Breeyear v. Insurance Co.*, 71 N. H. 445, 52 Atl. 860; *Home Ins. Co. v. Koob*, 68 S. W. 453, 24 Ky. Law Rep. 223, 58 L. R. A. 58; *Westchester Fire Ins. Co. v. Foster*, 90 Ill. 121; *Cowart v. Insurance Co.*, 114 Ala. 356, 22 South. 574; *Hughes v. Insurance Co.*, 40 Neb. 626, 59 N. W. 112; *McKelvy v. Insurance Co.*, 161 Pa. 279, 28 Atl. 1115. But in *Arnold v. Insurance Co.*, 106 Tenn. 529, 61 S. W. 1032, it was held that the procurement of insurance by the owner of goods after his friend, at his request, had secured insurance for him, constituted double insurance, although he did not know that his friend had succeeded in obtaining the insurance.

¹²² *German Ins. Co. v. Emporia Mut. Loan & Savings Ass'n*, 9 Kan. App. 803, 59 Pac. 1092; *Arnold v. Insurance Co.*, 106 Tenn. 529, 61 S. W. 1032.

¹²³ *Diver v. Insurance Co.*, 9 N. Y. St. Rep. 482; *OGDEN v. INSURANCE CO.*, 50 N. Y. 388, 10 Am. Rep. 492; *Havens v. Insurance Co.*, 111 Ind. 90, 12 N. E. 137, 60 Am. Rep. 689; *Liscom v. Insurance Co.*, 9 Metc. (Mass.) 205; *Phenix Ins. Co. v. Michigan Southern & Northern I. R. Co.*, 28 Ohio St. 69.

¹²⁴ *Howard Ins. Co. v. Hocking*, 115 Pa. 415, 8 Atl. 592; *Sloat v. Insurance Co.*, 49 Pa. 14, 88 Am. Dec. 477; *Meigs v. Insurance Co.*, 205 Pa. 378, 54 Atl. 1053. But see *Meigs v. Assurance Co. (C. C.)* 126 Fed. 781, applying the general rule to exactly the same facts.

construed to be other valid insurance.¹²⁵ When both policies in question contained the prohibition against other insurance, the courts were hopelessly at variance as to the effect to be given to these conditions. In some states it was held that the first policy was rendered void by the issue of the second,¹²⁶ which, therefore, was to be held valid, since upon its issue there was no other valid insurance. In other states it was held that the issue of the second policy was inoperative, inasmuch as by its terms it was absolutely void because of the existence of a preceding insurance.¹²⁷ This view left the first contract valid and enforceable, because no subsequent valid insurance had been obtained. On principle this would seem to be the sounder view, although the fact that the word "void" in insurance contracts means "voidable" makes the question one of much difficulty.¹²⁸

OPERATION OF FACTORIES.

164. A manufacturing establishment does not cease to be operated, within the meaning of the condition, unless operation totally ceases of definite purpose, and not merely incidentally, in the course of ordinary manufacture.

"* * * If the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days."

¹²⁵ Phoenix Ins. Co. v. Copeland, 86 Ala. 551, 6 South. 143, 4 L. R. A. 848; Germania Fire Ins. Co. v. Klewer, 129 Ill. 599, 22 N. E. 489; Reed v. Insurance Co., 17 R. I. 785, 24 Atl. 833, 18 L. R. A. 496.

¹²⁶ In Funke v. Insurance Ass'n, 29 Minn. 347, 13 N. W. 164, 43 Am. Rep. 216, it was held that other insurance, though void by its terms, defeated the first insurance. But in Pitney v. Insurance Co., 65 N. Y. 6, it was held that taking out a new policy in the place of renewing an old one was not "other insurance," within the meaning of the term. Also, see Brown v. Insurance Co., 18 N. Y. 391; Emery v. Insurance Co., 51 Mich. 469, 16 N. W. 816, 47 Am. Rep. 590.

¹²⁷ Sutherland v. Insurance Co., 31 Grat. (Va.) 176; Reed v. Insurance Co., 17 R. I. 785, 24 Atl. 833, 18 L. R. A. 496; Thomas v. Insurance Co., 119 Mass. 121, 20 Am. Rep. 317; Knight v. Insurance Co., 26 Ohio St. 664, 20 Am. Rep. 778; Hardy v. Insurance Co., 4 Allen (Mass.) 217; Lindley v. Insurance Co., 65 Me. 368, 20 Am. Rep. 701; Jersey City Ins. Co. v. Nichol, 35 N. J. Eq. 291, 40 Am. Rep. 625; Clark v. Insurance Co., 6 Cush. (Mass.) 342, 53 Am. Dec. 44.

¹²⁸ In Behrens v. Insurance Co., 64 Iowa, 19, 19 N. W. 833, it was held that subsequent insurance did not invalidate a prior policy if that subsequent insurance was known and treated by the parties as void, but that it would be otherwise if the parties, with knowledge of the facts, should regard such insurance as binding. Germania Fire Ins. Co. v. Klewer, 129 Ill. 599, 22 N. E. 489. It is held in this case that at the expiration of the first policy the second policy is revived.

By this condition the insurer seeks to protect himself against the increase of hazard due to the unusual operation of a manufacturing establishment during the later hours of the night, or to the desertion of such establishment when it is shut down for any considerable period. The breach of this condition avoids the policy, irrespective of the question whether an increase of risk resulted from such breach or not.¹²⁹ The only difficulty arising in the construction of the condition is found in determining when the factory ceases to be operated within the meaning of the language used. In deciding whether there has been a cessation of operation in any case, the courts will keep in mind the character of the establishment and the customary method of its operation. Any temporary suspension which may be ordinarily incident to the operation of the establishment will not constitute a breach of this condition, as where, for instance, a low stage of water causes a sawmill to cease operation for several weeks, during which time high water was daily expected.¹³⁰ In order to avoid a policy under this condition, the cessation must be due to a shutting down of the works with the intention to allow them to remain idle for some considerable period, as where a sawmill is deserted during the winter months, operations beginning again only with the opening of spring.¹³¹

In order that a factory shall be in operation within the meaning of this clause, it is not necessary that all of its departments shall be operated. It is sufficient if any portion of the ordinary work of manufacturing is being carried on.¹³²

¹²⁹ Dove: Glassworks Co. v. Insurance Co., 1 Mary. (Del.) 32, 29 Atl. 1039, 65 Am. St. Rep. 264. Permission that the establishment shall cease to be operated for a specified period merely suspends the condition during that period. Upon its expiration the condition reattaches, and the policy is avoided by continued cessation of operation. El Paso Reduction Co. v. Insurance Co. (C. C.) 121 Fed. 937; Reardon v. Insurance Co., 135 Mass. 121; Cronin v. Association, 123 Mich. 277, 82 N. W. 44.

¹³⁰ City Planing & Shingle Mill Co. v. Merchants' Manufacturers' & Citizens' Mut. Fire Ins. Co., 72 Mich. 654, 40 N. W. 777, 16 Am. St. Rep. 552. So when the illness of a foreman requires a temporary suspension in the operation of a sawmill. Ladd v. Insurance Co., 147 N. Y. 478, 42 N. E. 197. The suspension of active operations in a tannery on account of a temporary failure in the supply of material needed does not avoid the insurance upon it. LEBANON MUT. INS. CO. v. LEATHERS (Pa.) 8 Atl. 424, Woodruff, Ins. Cas. 172.

¹³¹ McKenzie v. Insurance Co., 112 Cal. 548, 44 Pac. 922. And see Cronin v. Association, 123 Mich. 277, 82 N. W. 45.

¹³² American Fire Ins. Co. v. Brighton Cotton Mfg. Co., 125 Ill. 131, 17 N. E. 771.

INCREASE OF RISK.

165. An increase of risk, within the terms of this condition, is such a substantial change of conditions affecting the risk as materially to increase it. Mere negligent acts temporarily endangering the property do not violate the condition.

"* * * If the hazard be increased by any means within the control or knowledge of the insured."

There is an implied term in every contract of insurance that the insured will do no act to make the risk greater than that which was assumed by the insurer. The standard policy contains an express statement of this term, and extends it to such acts of others, increasing the risk, as may be within the control or knowledge of the insured. It is clear that this condition is not violated by the act of the insured's tenant, or other agent, in increasing the risk, provided that act is not known to the insured.¹³³ It would seem, however, that any act of the insured's tenant substantially and permanently affecting the condition of the property, so as to constitute an increase of risk, would be presumptively known to the insured.¹³⁴ Likewise any acts done on property adjacent to that insured, although increasing the risk, would not violate this condition unless actually known to the insured.¹³⁵

What Constitutes an Increase of Risk.

One of the principal purposes of the insurance contract is to protect the insured against the consequence of his own negligence and that of his servants.¹³⁶ Hence the insurer will not be permitted to defeat this

¹³³ McGammon v. Insurance Co., 171 Mo. 143, 17 S. W. 160, 94 Am. St. Rep. 778; Springfield Fire & Marine Ins. Co. v. Wade, 95 Tex. 598, 68 S. W. 977, 58 L. R. A. 714, 93 Am. St. Rep. 870. But see Thuringia Ins. Co. v. Norwaysz, 104 Ill. App. 390; Badger v. Platts, 68 N. H. 222, 44 Atl. 296, 73 Am. St. Rep. 572; KELLY v. INSURANCE CO., 97 Mass. 284. In Liverpool & London & Globe Ins. Co. v. Gunther, 116 U. S. 113, 6 Sup. Ct. 306, 29 L. Ed. 575, it was held that if any of the conditions of the policy were violated by the presence or use of gasoline, naphtha, or benzine on the insured premises, it was immaterial whether or not the insured knew of such violation, and that such acts would be considered as a violation of the condition by the insured himself.

¹³⁴ Liverpool & London & Globe Ins. Co. v. Gunther, 116 U. S. 113, 6 Sup. Ct. 306, 29 L. Ed. 575; Thuringia Ins. Co. v. Norwaysz, 104 Ill. App. 390. But see Springfield Fire & Marine Ins. Co. v. Wade, 95 Tex. 598, 68 S. W. 977, 58 L. R. A. 714, 93 Am. St. Rep. 870.

¹³⁵ See German Ins. Co. v. Wright, 6 Kan. App. 611, 49 Pac. 704.

¹³⁶ Des Moines Ice Co. v. Niagara Fire Ins. Co., 99 Iowa, 193, 63 N. W. 600. In Karow v. Insurance Co., 57 Wis. 56, 15 N. W. 27, 46 Am. Rep. 17, the insured was allowed to recover on his policy, though he burned his own property when insane. Henderson v. Insurance Co., 10 Rob. (La.) 164, 43 Am. Dec. 176; Cumberland Valley Mut. Protection Co. v. Douglas, 58 Pa.

proper purpose by claiming such a construction of the condition prohibiting an increase of risk as to make the contributory negligence of the insured or of his servants a defense to an action on the policy.¹³⁷ A mere negligent act, temporarily endangering the property, will not be regarded as increasing the risk within the meaning of this condition, even though the fire may have been caused directly by such negligence.¹³⁸ Thus, where an insured carelessly used kerosene in kindling a fire in a stove, and in so doing caused the insured house to catch fire, it was held that the insurer was liable on the policy despite the presence of the condition against increase of risk.¹³⁹ The parties must be assumed to have intended that the insured building shall be put to such uses as are buildings of the same kind, so that the making of repairs, painting, or doing other acts of similar character, are not to be regarded as increasing the risk, since the property would be useless to the insured if such acts were prohibited.¹⁴⁰

But any change in the condition of the property insured which tends to increase the risk substantially and permanently, or for a considerable period, is within the condition.¹⁴¹ Thus, keeping in the house a small

419, 98 Am. Dec. 298; Gates v. Insurance Co., 5 N. Y. 469, 55 Am. Dec. 360; JOHNSON v. INSURANCE CO., 4 Allen (Mass.) 388; Huckins v. Insurance Co., 31 N. H. 238; Maryland Fire Ins. Co. v. Whiteford, 31 Md. 219, 100 Am. Rep. 45; ANGLIER v. ASSURANCE CO., 10 S. D. 82, 71 N. W. 761, 66 Am. St. Rep. 685.

¹³⁷ Des Moines Ice Co. v. Niagara Fire Ins. Co., supra; Henderson v. Insurance Co., 10 Rob. (La.) 164, 43 Am. Dec. 176; Gates v. Insurance Co., 5 N. Y. 469, 55 Am. Dec. 360; Huckins v. Insurance Co., 31 N. H. 238; Rogers v. Insurance Co., 35 C. C. A. 396, 95 Fed. 103.

¹³⁸ Scottish Union & Nat. Ins. Co. v. Strain, 70 S. W. 274, 24 Ky. Law Rep. 958. In Des Moines Ice Co. v. Niagara Fire Ins. Co., supra, it was said that an insurance policy would be of little value if it was permissible to set up a defense in every case where negligence could be shown. Pool v. Insurance Co., 91 Wis. 530, 65 N. W. 62, 51 Am. St. Rep. 919; JOHNSON v. INSURANCE CO., 4 Allen (Mass.) 388. In Hartford Ins. Co. v. Williams, 11 C. C. A. 503, 63 Fed. 925, it was held that the voluntary destruction by the owner would not prevent the mortgagee from recovering on his policy. Maryland Fire Ins. Co. v. Whiteford, 31 Md. 219, 100 Am. Rep. 45.

¹³⁹ ANGLIER v. ASSURANCE CO., 10 S. D. 82, 71 N. W. 761, 66 Am. St. Rep. 685. And see Springfield Fire & Marine Ins. Co. v. Wade, 95 Tex. 598, 68 S. W. 977, 58 L. R. A. 714, 93 Am. St. Rep. 870.

¹⁴⁰ Mears v. Insurance Co., 92 Pa. 15, 37 Am. Rep. 647; Au Sable Lumber Co. v. Detroit Mfrs' Fire Ins. Co., 89 Mich. 407, 50 N. W. 870; O'NIEL v. INSURANCE CO., 3 N. Y. 122; Morse v. Insurance Co., 30 Wis. 534, 11 Am. Rep. 587; Lutz v. Insurance Co., 205 Pa. 159, 54 Atl. 721.

¹⁴¹ Boyer v. Insurance Co., 124 Mich. 455, 83 N. W. 124, 83 Am. St. Rep. 338; Vandervolgen v. Assurance Co., 123 Mich. 291, 82 N. W. 46; First Congregational Church v. Holyoke Mut. Fire Ins. Co., 158 Mass. 475, 33 N. E. 572, 19 L. R. A. 587, 35 Am. St. Rep. 508; Williams v. Insurance Co., 57 N. Y. 274; Kircher v. Insurance Co., 74 Wis. 470, 43 N. W. 487, 5 L. R. A. 779; KYTE v. ASSURANCE CO., 149 Mass. 116, 21 N. E. 361, 3 L. R. A. 508.

quantity of gasoline, needed for removing old paint during the course of making repairs, does not increase the risk,¹⁴² but keeping such gasoline permanently in the house, or for sale, or for other purposes, would undoubtedly violate this condition.¹⁴³ So it has been held that, where the insured made a practice of throwing kerosene-soaked clothing in a box kept in the house insured, it was a proper question for the jury whether the risk was increased.¹⁴⁴ The use of a naphtha torch in burning off paint from the insured premises, which was continued during a month, was held to be an increase of the risk.¹⁴⁵ The mere fact that additions to or alterations of the insured premises are made without the consent of the insurer does not avoid the policy under this condition. Whether or not such repairs or additions constitute an increase of risk is, as in all other cases, a question for the jury.¹⁴⁶

MAKING REPAIRS.

166. The condition with regard to the employment of mechanics in making repairs is unambiguous, and will be enforced according to its terms, whether the risk is increased or not.

"* * * If mechanics be employed in building, altering, or repairing the within described premises for more than fifteen days at any one time."

Richards, Ins. Cas. 457; Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231; Liverpool & London & Globe Ins. Co. v. Gunther, 116 U. S. 113, 6 Sup. Ct. 306, 29 L. Ed. 575.

¹⁴² Smith v. Insurance Co., 107 Mich. 270, 65 N. W. 236, 30 L. R. A. 368. And see Mears v. Insurance Co., 92 Pa. 15, 37 Am. Rep. 647; Au Sable Lumber Co. v. Detroit Mfrs.' Fire Ins. Co., 89 Mich. 407, 50 N. W. 870; O'NIEL v. INSURANCE CO., 3 N. Y. 122; Williams v. Insurance Co., 54 N. Y. 569, 13 Am. Rep. 620; Springfield Fire & Marine Ins. Co. v. Wade, 95 Tex. 598, 68 S. W. 977, 58 L. R. A. 714, 93 Am. St. Rep. 870.

¹⁴³ Sperry v. Insurance Co. (C. C.) 26 Fed. 234; Lutz v. Insurance Co., 205 Pa. 150, 54 Atl. 721; Steinbach v. Insurance Co., 13 Wall. (U. S.) 183, 20 L. Ed. 615. But see Ackley v. Insurance Co., 25 Mont. 272, 64 Pac. 665, in which a reasonable quantity of the prohibited articles kept by a druggist did not effect a forfeiture, being such things as a druggist usually kept, notwithstanding the clause in the policy which prohibited the keeping of them. But in this case the insurers had indorsed on the policy a permit allowing the insured to keep such things as were customary for a druggist to keep, and the court, in construing this clause with the conflicting clause in the policy, reached the above conclusion.

¹⁴⁴ Williams v. Insurance Co., 57 N. Y. 274, Richards, Ins. Cas. 452.

¹⁴⁵ First Congregational Church v. Holyoke Mut. Fire Ins. Co., 158 Mass. 475, 33 N. E. 572, 19 L. R. A. 587, 35 Am. St. Rep. 508.

¹⁴⁶ MERRIAM v. INSURANCE CO., 21 Pick. (Mass.) 162, 32 Am. Dec. 252; Pool v. Insurance Co., 91 Wis. 530, 65 N. W. 54, 51 Am. St. Rep. 919; Smith v. Insurance Co., 107 Mich. 270, 65 N. W. 236, 30 L. R. A. 368; Williams v. Insurance Co., 57 N. Y. 274; Kircher v. Insurance Co., 74 Wis. 470, 43 N. W. 487, 5 L. R. A. 779.

There appears to be little room for doubt as to the proper construction of this condition, and it seems to have given rise to little litigation. It is supplementary to the preceding condition prohibiting an increase of hazard. If mechanics are employed for the specified time, the condition is broken and the policy avoided, unless the insurer has previously consented to such repairs or waived his right to claim the forfeiture. It is immaterial whether the making of the repairs increased the risk or not, or whether it in any wise contributed to the loss.¹⁴⁷ By the better authority the policy becomes void at the option of the insurer, even though the fire takes place long after the repairs have been completed.¹⁴⁸ Painting or papering the building insured, or any other work done in ornamenting it, constitutes repairs, as well as do changes in its structure¹⁴⁹ more usually understood as coming within that term.

¹⁴⁷ German Ins. Co. v. Hearne, 117 Fed. 289, 54 C. C. A. 527, 59 L. R. A. 492, Newport Imp. Co. v. Home Ins. Co., 163 N. Y. 237, 57 N. E. 475.

¹⁴⁸ Imperial Fire Ins. Co. v. Coos County, 151 U. S. 463, 14 Sup. Ct. 379, 38 L. Ed. 231; KYTE v. ASSURANCE CO., 149 Mass. 116, 21 N. E. 361, 3 L. R. A. 508, Richards, Ins. Cas. 457.

¹⁴⁹ German Ins. Co. v. Hearne, 117 Fed. 289, 54 C. C. A. 527, 59 L. R. A. 492.

VANCE INS.—30

CHAPTER XIII.

THE STANDARD FIRE POLICY (Continued).

- 167. Foreclosure Proceedings.
- 168. Assignments.
- 169. Generation of Gas.
- 170. Explosive and Inflammable Substances.
- 171. Vacant or Unoccupied Buildings.
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- 191. Limitation upon Actions.

FORECLOSURE PROCEEDINGS.

167. The condition avoiding the policy upon foreclosure proceedings is reasonable, and is fairly enforced. By the terms of the condition the first legal step instituting the proceedings to foreclose violates the condition.

"* * * If with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed."

This condition, giving the insurer the opportunity to cancel the policy in case any legal proceedings are instituted for the purpose of foreclosing any mortgage or other lien upon the insured property, is inserted in recognition of the fact that the prospect of early loss of property by legal process is apt to induce the insured to bring about its more profitable destruction by fire. The condition is reasonable and in full accord with public policy, and as a general rule the courts have given it a construction perfectly fair to the insurer. Its terms clearly indicate that it is the duty of the insured, immediately upon acquiring knowledge in any manner whatever of the commencement of foreclosure proceedings, or of notice that the property will be sold by virtue of the power given in a mortgage or trust deed, to give that information to the insurer, who may then, at his option, cancel the policy, or indorse upon it an agreement for the continuance of the insurance in spite of such proceedings. This has been

the construction given by most of the courts before which the question has come,¹ but, curiously enough, in a few jurisdictions the courts have looked at the terms of the condition with such distorted vision as to see in it a requirement that notice must be given to the insured before the commencement of the foreclosure proceedings in order that the condition shall be violated. Thus, it has been held in North Carolina that where a sale of the insured property was advertised under a deed of trust without previous notice to the insured, who, however, saw the notice of the sale before the fire, there was no breach of the condition.² It was further held in this case that the knowledge of such impending sale possessed by the local agent of the insurer made it incumbent upon the insurer to cancel the policy and return the unearned premium, and that its failure to do so was meant to be a waiver of the breach, if any existed. This, however, is clearly opposed to both reason and authority. In other states it has also been held that the filing of a bill to foreclose a mortgage, without previous notice thereof to the insured, did not avoid the insurance under this condition, although the insured had knowledge of the commencement of the proceedings a short time thereafter.³

It will be noted that the condition requires notice to the insurer of the commencement of foreclosure proceedings if known to the insured. It is held by the courts that such proceedings are deemed to "commence" with the first legal step taken to bring about foreclosure, such as the service of the petition to foreclose upon the insured.⁴ So it is generally held that the public advertisement of the sale under a mortgage or deed of trust is such notice as is contemplated by the condition.⁵

¹ See, especially, *Delaware Ins. Co. v. Greer*, 120 Fed. 916, 57 C. C. A. 188, 61 L. R. A. 137; also, *Quinlan v. Insurance Co.*, 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645; *Merchants' Ins. Co. v. Brown*, 77 Md. 79, 25 Atl. 992; *McKinney v. Assurance Co.*, 97 Ky. 474, 30 S. W. 1004.

² *Horton v. Insurance Co.*, 122 N. C. 498, 29 S. E. 944, 65 Am. St. Rep. 717.

³ *Bellevue Roller-Mill Co. v. London & L. Fire Ins. Co.*, 4 Idaho, 307, 39 Pac. 196; *North British & Mercantile Co. v. Freeman* (Tex. Civ. App.) 33 S. W. 1091.

⁴ *Findlay v. Insurance Co.*, 74 Vt. 211, 52 Atl. 429, 93 Am. St. Rep. 885.

⁵ *Springfield Steam Laundry Co. v. Traders' Ins. Co.*, 151 Mo. 90, 52 S. W. 238, 74 Am. St. Rep. 521; *Merchants' Ins. Co. v. Brown*, 77 Md. 79, 25 Atl. 992; *Hayes v. Insurance Co.*, 132 N. C. 702, 44 S. E. 404; *Delaware Ins. Co. v. Greer*, 120 Fed. 916, 57 C. C. A. 188, 61 L. R. A. 137. But in *Weiss v. Insurance Co.*, 148 Pa. 349, 23 Atl. 991, it was held that the issue of a scire facias on the property was not a commencement of foreclosure proceedings. See, also, *Hanover Fire Ins. Co. v. Brown*, 77 Md. 64, 27 Atl. 314, 39 Am. St. Rep. 388.

ASSIGNMENTS.

168. The condition avoiding the policy in case of assignment without consent of insurer applies to an assignment accompanying a conveyance of the property insured, and not merely a pledge of the policy as collateral security for a debt.

"* * * If this policy be assigned before a loss."

Since personal and moral considerations are so important an element in the hazard involved in any insurance contract, it is manifest that the insurer cannot be compelled to accept as the party insured any person to whom the policy may be assigned. The contract is personal, and does not in any wise run with or adhere in the property insured. Therefore the assignment of the policy, without the consent of the insurer, to a person to whom the subject of insurance has been transferred, absolutely avoids the contract of insurance,⁶ unless the insurer has agreed to accept the assignee as the other party to the contract, which agreement in effect creates a novation. Likewise an absolute assignment before loss to one having no interest in the property would be vicious and in violation of the condition.⁷

None of the considerations just stated as prohibiting an assignment of insurance to the transferee of the insured property are present in the case of a mere pledge of the policy. The pledgee occupies no contractual relation towards the insurer, nor has he anything to do with the subject of insurance. The insurer, therefore, has no reason for objecting to such a pledge, which is not infrequently made by a mere delivery of policy as additional security for some debt.⁸ The legal effect of such a pledge is merely to make the pledgee the equitable assignee of any fund that may become due under the policy.⁹

An assignment of the policy after loss, when it has become a mere money claim, is not within the condition.¹⁰ Nor would an attempted restraint upon such an assignment be valid.¹¹

⁶ *Buchanan v. Insurance Co.*, 61 N. Y. 611; *Watertown Fire Ins. Co. v. Cherry*, 84 Va. 72, 3 S. E. 876; *Stolle v. Insurance Co.*, 10 W. Va. 546, 27 Am. Rep. 593. But this condition is not violated by the insured's agreement that the carrier shall be entitled to any insurance carried, in case of loss. *Jackson Co. v. Boylston Mut. Ins. Co.*, 139 Mass. 508, 2 N. E. 103, 52 Am. Rep. 728.

⁷ *Bentley v. Insurance Co.*, 40 W. Va. 729, 23 S. E. 584.

⁸ *Key v. Insurance Co.*, 101 Mo. App. 344, 74 S. W. 162; *True v. Insurance Co. (C. C.)* 26 Fed. 83; *Giffey v. Insurance Co.*, 100 N. Y. 417, 3 N. E. 309, 53 Am. Rep. 202. But see *Ferree v. Insurance Co.*, 67 Pa. 373, 5 Am. Rep. 436, in which the terms of the condition are peculiar.

⁹ See *Cromwell v. Insurance Co.*, 39 Barb. (N. Y.) 227.

¹⁰ *Roger Williams Ins. Co. v. Carrington*, 43 Mich. 252, 5 N. W. 303.

¹¹ *Alkan v. Insurance Co.*, 53 Wis. 136, 10 N. W. 91.

GENERATION OF GAS.

169. The condition prohibiting the generation of illuminating gas or vapor on the insured premises is so clearly worded as not to have given any occasion for dispute as to its construction.

"* * * If illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein."

The insurer is justified in inserting such a provision, which it will be noticed refers only to the generation of gas on the premises, and not to its use. While there may have been litigation involving the construction of this condition, the reported cases do not give any evidence of it. It is doubtless true, however, that the same general principle would be applied in construing the terms of this condition as have been so frequently applied in connection with other conditions of the fire policy; that is, the condition must be substantially, and not merely literally, violated in order to avoid the policy. It is doubtful whether the generation of illuminating gas in small quantities, as for bicycle lamps, would be construed as a breach of this condition.

EXPLOSIVE AND INFLAMMABLE SUBSTANCES.

170. The presence of any of these prohibited substances on the insured premises will avoid the insurance only when in such quantities and for such a time as materially to increase the risk. And when the property insured, as described in the policy, either expressly or by reasonable implication, includes any of the prohibited substances, their presence on the premises insured will not avoid the insurance.

"* * * Or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard, (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light)."

This condition, while proper and valid, will be given a reasonable construction, so as to carry out the intention of the parties. The presence of such small quantities of these inflammable materials, or of large quantities for so short a time as not to materially increase the hazard.

will not be construed as constituting a breach of the condition,¹² which is manifestly aimed at the hazardous consequences resulting from the presence of explosives and other highly inflammable substances.

It will also be noted that the terms of the condition apply equally well to those cases in which these prohibited articles are kept on the insured premises without the knowledge or consent of the insured nor by his procurement. Thus, the act of a tenant in keeping benzine upon the premises constitutes a breach of this condition, despite the fact that it was done without the knowledge or consent of the insured.¹³

As Affected by Custom and Usage of Trade.

It has become a settled rule of construction that when the written description of the subject of insurance includes property which customarily consists in part of some of the prohibited inflammable substances, or where the building insured is described as being used for some trade or business which customarily involves the use of these inflammable substances, the printed condition will yield to the written description, and the policy remain valid in spite of the presence of such articles.¹⁴ Thus, in a New York case it was held when a policy was issued on a store that was to be used as "a fancy goods and Yankee notion store" it was not avoided by the presence of fireworks in the store, when it was shown that fireworks were ordinarily recognized as part of the stock of goods usually carried in such a store.¹⁵ So, in spite of this provision, gunpowder may be kept as a part of a stock of goods in a country store when it is shown that gunpowder is usually kept in such stores.¹⁶ Likewise insurance upon property described as "watchmakers' material" allows the keeping of benzine upon the premises, although expressly forbidden by the policy, since benzine, used for cleaning purposes, is a necessary material in the watchmaker's shop.¹⁷ This rule of construction, however, like every other such rule, is intended merely to carry out the intentions of the parties, and not to defeat them.

¹² Bayly v. Insurance Co., Fed. Cas. No. 1,145; Phoenix Ins. Co. v. Taylor, 5 Minn. 492 (Gil. 393); Williams v. Insurance Co., 54 N. Y. 569, 13 Am. Rep. 620.

¹³ Liverpool & L. & G. Ins. Co. v. Gunther, 116 U. S. 113, 6 Sup. Ct. 306, 29 L. Ed. 575; Duncan v. Insurance Co., 6 Wend. (N. Y.) 488, 22 Am. Dec. 539; Thuringia Ins. Co. v. Norwaysz, 104 Ill. App. 390. But see Springfield Fire & Marine Ins. Co. v. Wade, 95 Tex. 598, 68 S. W. 977, 58 L. R. A. 714, 93 Am. St. Rep. 870.

¹⁴ Citizens' Ins. Co. v. McLaughlin, 53 Pa. 485; Lancaster Silver Plate Co. v. Fire Ins. Co., 170 Pa. 151, 32 Atl. 613; Hall v. Insurance Co., 58 N. Y. 292, 17 Am. Rep. 255.

¹⁵ Barnum v. Insurance Co., 97 N. Y. 188.

¹⁶ Peoria Marine & Fire Ins. Co. v. Hall, 12 Mich. 202. To the same effect, see Yoch v. Insurance Co., 111 Cal. 503, 44 Pac. 189, 34 L. R. A. 857.

¹⁷ Marl v. Insurance Co., 95 Ga. 604, 23 S. E. 463, 30 L. R. A. 835, 51 Am. St. Rep. 102.

Therefore a custom or usage to employ the prohibited articles in a given trade or business will not be allowed to negative the effect of a prohibitory condition, when the court may reasonably infer from all the circumstances in the case that the parties in fact intended to exclude such hazardous articles, despite the custom of trade. Thus, where the policy prohibited the keeping of nitroglycerin on the insured premises, it was held that this condition was intended to override a usage in the business of the insured to keep nitroglycerin and dynamite for sale.¹⁸ So it was held by the Supreme Court of the United States¹⁹ that insurance granted upon a stock of fancy goods, toys, and other articles in the insured's line of business as a jobber and importer, with privilege to keep firecrackers, was avoided by the insured keeping fireworks which were expressly prohibited in the policy, although it was shown that fireworks were usually kept by those engaged in the plaintiff's business. The Court of Appeals of New York,²⁰ considering the same clause of a similar policy, under exactly the same facts, held that the insurer was liable on the policy despite the presence of the fireworks in accordance with the general doctrine explained above. These two cases so differently decided, by two such eminent courts, show strikingly the difficulty of applying this rule of construction.

The form of this condition, as appearing in the standard policy, contains the expression, "any usage or custom of trade or manufacture to the contrary notwithstanding." This clause is evidently aimed at the rule laid down by the courts that a usage of business can be shown in order to include some of the prohibited articles in the subject of insurance as described. The effort of the draftsman of the standard policy to abrogate this rule has been wholly abortive, and must necessarily have been. The very theory of the rule is that the written description of the property insured prevails over repugnant printed terms of any condition of the policy. Therefore any expression that may be used in order to strengthen the repugnancy will wholly fail to affect the rule of construction.²¹

VACANT OR UNOCCUPIED BUILDINGS.

171. The condition requiring that the building insured shall not be vacant or unoccupied is satisfied by such occupation as is involved in the ordinary use of buildings of like kind with that insured. A church or a barn is not occupied in the same fashion as a dwelling house. A dwelling is "vacant" when permanently deserted by its tenant, and "unoccupied" during his temporary absence.

¹⁸ Sperry v. Insurance Co., 26 Fed. 234. See, also, Lutz v. Insurance Co., 205 Pa. 159, 54 Atl. 721.

¹⁹ Steinbach v. Insurance Co., 13 Wall. 183, 20 L. Ed. 615.

²⁰ Steinbach v. Insurance Co., 54 N. Y. 90.

²¹ Ackley v. Insurance Co., 25 Mont. 272, 64 Pac. 665.

"* * * If a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days."

The purpose of this condition is to secure for the insured building the presence and care of some occupant whose watchfulness will tend to preserve the property.²² But it is apparent at the outset that buildings designed for different purposes are susceptible of occupancy in very different degrees. Thus a church or schoolhouse cannot, in the nature of things, be occupied in the same manner as a dwelling house, while a barn is less capable of being actually occupied than is a church. Therefore the condition requiring that the property shall be occupied, and not vacant, will be construed reasonably, with reference to what must have been the intention of the parties, in view of the character of the building.²³

A church or schoolhouse is considered to be occupied when it is used in the customary manner. It is "unoccupied and vacant" when it ceases to be so used.²⁴ The mere fact, however, that a church building should be closed for one week or several weeks on account of the illness or absence of the pastor, or for other adventitious reasons, would not cause it to be "unoccupied," nor would a schoolhouse be "unoccupied" if it was temporarily closed during an epidemic. A barn is to be regarded as occupied when used for those purposes to which such buildings are ordinarily put, as the housing of horses, or the storing of hay and grain. If the barn were allowed to fall into disuse, so that it was no longer receiving daily visits of the owner or his representative, it would be "unoccupied."²⁵ The same principle applies to insurance upon a mill²⁶ or factory²⁷ or store.²⁸

There is a distinction made even between the different kinds of dwell-

²² *Names v. Insurance Co.*, 95 Iowa, 642, 64 N. W. 628. Therefore, mala fide occupancy does not satisfy the condition.

²³ *Limburg v. Insurance Co.*, 90 Iowa, 709, 57 N. W. 626, 23 L. R. A. 99, 48 Am. St. Rep. 468; *Hoover v. Insurance Co.*, 93 Mo. App. 111, 69 S. W. 42; *Continental Ins. Co. v. Kyle*, 124 Ind. 132, 24 N. E. 727, 9 L. R. A. 81, 19 Am. St. Rep. 77; *WHITNEY v. INSURANCE CO.*, 72 N. Y. 117, 28 Am. Rep. 116; *Georgia Home Ins. Co. v. Kinnier's Adm'x*, 28 Grat. (Va.) 88; *Sonneborn v. Insurance Co.*, 44 N. J. Law, 220, 43 Am. Rep. 365.

²⁴ *Limburg v. Insurance Co.*, 90 Iowa, 709, 57 N. W. 626, 23 L. R. A. 99, 48 Am. St. Rep. 468; *Home Ins. Co. v. Scales*, 71 Miss. 975, 15 South. 134, 42 Am. St. Rep. 512; *Caraher v. Insurance Co.*, 63 Hun, 82, 17 N. Y. Supp. 858.

²⁵ See *Fritz v. Insurance Co.*, 78 Mich. 565, 44 N. W. 139.

²⁶ *Bellevue Roller Mill Co. v. London & L. Fire Ins. Co.*, 4 Idaho, 307, 39 Pac. 196; *American Fire Ins. Co. v. Brighton Cotton Mfg. Co.*, 24 Ill. App. 149; *Id.*, 125 Ill. 131, 17 N. E. 771.

²⁷ *Halpin v. Insurance Co.*, 118 N. Y. 165, 23 N. E. 482.

²⁸ *Limburg v. Insurance Co.*, supra; *Rockford Ins. Co. v. Wright*, 39 Ill. App. 574.

ings. Thus it is generally held that the expression "vacant and unoccupied" has a different significance when used in reference to houses known by the insurer to be customarily leased to tenants from that which it bears when applied to dwellings occupied by the owner. It is well known that tenement houses are liable to be left unoccupied for a few days between the moving out and the moving in of successive tenants. Such temporary lack of occupation is considered to be incident to the known use of the buildings, and therefore not to violate the terms of this condition.²⁹ It is probable, however, that this peculiar rule of construction will not apply to the condition of the standard policy, which, it will be noted, contains a qualification, "whether intended for occupancy by owner or tenant."

The Distinction between Unoccupied and Vacant Buildings.

In the construction of this provision a marked distinction between vacancy and lack of occupation has grown up. A building is said to be vacant when it is wholly and permanently deserted by its former tenant, with the removal of all his goods therefrom.³⁰ But when the house is merely closed temporarily during an absence of the tenant it is said to be "unoccupied." Thus, a house which has been shut up for the summer, with all of its furniture and other accessories of habitation remaining in it, is not vacant, but merely unoccupied, even though it may be tenantless for many months.³¹

²⁹ *Union Ins. Co. v. McCullough* (Neb.) 96 N. W. 79; *Liverpool & L. & G. Ins. Co. v. Buckstaff*, 38 Neb. 146, 56 N. W. 695, 41 Am. St. Rep. 724; *German-American Ins. Co. v. Buckstaff*, 38 Neb. 135, 56 N. W. 692; *Hunt v. Insurance Co.* (Neb.) 92 N. W. 921; *Roe v. Insurance Co.*, 149 Pa. 94, 23 Atl. 718, 34 Am. St. Rep. 595; *Traders' Ins. Co. v. Race* (Ill.) 29 N. E. 846; *Home Ins. Co. v. Wood*, 47 Kan. 521, 28 Pac. 167; *City Planing & Shingle Mill Co. v. Merchants', Manufacturers' & Citizens' Mut. Fire Ins. Co.*, 72 Mich. 654, 40 N. W. 777, 16 Am. St. Rep. 552. A well-expressed statement of the principle upon which these cases rest may well be quoted from *Hotchkiss v. Insurance Co.*, 76 Wis. 269, 11 N. W. 1106, 20 Am. St. Rep. 69, as follows: "Under certain circumstances premises may be vacant or unoccupied when, under other circumstances, premises in like situation may not be so, within the meaning of that term in insurance policies. Thus, if one insures his dwelling house, described in the policy as occupied by himself as his residence, and moves out of it, leaving no person in the occupation thereof, it thereby becomes vacant or unoccupied. But if he insures it as a tenement house, or as occupied by a tenant, it may fairly be presumed, nothing appearing to the contrary, that the parties to the contract of insurance contemplated that the tenant was liable to leave the premises, and that more or less time might elapse before the owner could procure another tenant to occupy them, and hence that the parties did not understand that they should be considered vacant and the policy forfeited or suspended, according to its terms, immediately upon the tenant's leaving it"—citing *Lockwood v. Assurance Co.*, 47 Conn. 561; *Whitney v. Insurance Co.*, 9 Hun, 39.

³⁰ See *HERRMAN v. INSURANCE CO.*, 85 N. Y. 162, 39 Am. Rep. 644, *Woodruff, Ins. Cas.* 165.

³¹ *Moody v. Insurance Co.*, 52 Ohio St. 12, 38 N. E. 1011, 26 L. R. A. 313.

In the earlier forms of this condition, the prohibition was against the building's being "vacant and unoccupied," whereas in the standard policy it is "vacant or unoccupied." The courts construed the earlier form as meaning that the insurance should remain valid unless the house was both vacant and unoccupied. But this loophole of escape for the careless householder seems to have been closed by the provision of the standard policy, which defeats the insurance if the building is either vacant or unoccupied.³²

COLLAPSE OF BUILDING.

172. In the standard policy a fall of any substantial part of the building insured immediately terminates the insurance.

"If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease."

The collapse of any building, whether because of a storm or of structural weakness, will almost inevitably cause the fallen structure to take fire. Loss from such a fire would impose a liability upon the insurer unless such a condition as the one above quoted appears in the policy. Under this condition, however, the insurance comes immediately to an end in case the whole or any part of the insured building falls. In older forms of this condition it was held that the insurance was not defeated unless the entire building fell,³³ but the Texas Supreme Court has recently held that under the standard form of policy the falling of a small cupola surmounting a large building constituted a breach of this condition and defeated the insurance.³⁴

49 Am. St. Rep. 699; *Cummins v. Insurance Co.*, 67 N. Y. 260, 23 Am. Rep. 111.

³² Compare *HERRMAN v. INSURANCE CO.*, 81 N. Y. 184, 37 Am. Rep. 488, with *HERRMAN v. INSURANCE CO.*, 85 N. Y. 162, 39 Am. Rep. 644, *Woodruff, Ins. Cas.* 165.

³³ *Security Ins. Co. v. Mette*, 27 Ill. App. 324; *Huck v. Insurance Co.*, 127 Mass. 306, 34 Am. Rep. 373.

³⁴ *Home Mut. Ins. Co. v. Tomkles & Co.*, 96 Tex. 187, 71 S. W. 814. To the same effect, see *Nelson v. Insurance Co.*, 86 App. Div. 66, 83 N. Y. Supp. 220. But even under the standard form the falling of an immaterial portion of the building, not a functional part of the structure, will not avoid the insurance. *London & L. Fire Ins. Co. v. Grunk*, 91 Tenn. 376, 23 S. W. 140.

LIABILITY OF THE INSURER.

173. DIRECT LOSS OR DAMAGE by fire, for which the insurer contracts to give indemnity, consists of all such injuries as are proximately due to the action of a hostile fire. These include not only damage done by actual ignition, but also such as results from charring, scorching, smoke, water used in quenching the fire, or from the hasty efforts to remove the goods insured to a place of safety.

(a) Fire is said to be the proximate cause of a loss when that loss has been caused by a force set in motion by fire, without the intervention of any new and independent force.

(b) A fire is hostile when it burns in a place or manner not intended.

174. EXCEPTED CAUSES—Under the standard policy certain causes of loss are expressly excepted. These, like all exceptions in favor of the insurer, will be construed strictly against him.

175. EXCEPTED SUBJECTS—Certain specified kinds of property which are peculiarly susceptible of overvaluation in case of loss are expressly excepted from the operation of the policy. Such exceptions will yield to an agreement inferable from the written description of the property insured to include such articles.

"* * * Does insure * * * against all direct loss or damage by fire, except as hereinafter provided."

Direct Damage by Fire.

Insurance against loss or damage by fire does not cover damage due merely to heat, unless that heat is due directly to a hostile fire. Thus damage due to intense heat caused by steam escaping from a broken steam pipe is not damage by fire;³⁵ nor is injury that is caused by the blistering heat of the sun. But if ignition actually takes place the insurer becomes liable, not only for the destruction by the flames themselves, but also for such damages as are immediately consequent upon the presence of the flames, such as injury by smoke,³⁶ and the charring or blistering of articles that are heated to a point lower than that of ignition. Likewise damage wrought to the property insured by water³⁷ used in efforts to extinguish the fire, or due to the efforts made to remove the property to a place of safety,³⁸ or loss by theft in the

³⁵ *Gibbons v. Insurance Co.*, 30 Ill. App. 263.

³⁶ *SCRIPTURE v. INSURANCE CO.*, 10 Cush. (Mass.) 356, 57 Am. Dec. 111, *Richards, Ins. Cas.* 439.

³⁷ *John Davis & Co. v. Insurance Co. of North America*, 115 Mich. 382, 73 N. W. 398.

³⁸ *Case v. Insurance Co.*, 13 Ill. 676; *Leiber v. Insurance Co.*, 6 Bush (Ky.) 639, 99 Am. Dec. 695; *WHITE v. INSURANCE CO.*, 57 Me. 91, 2 Am. Rep. 22.

course of such removal,³⁹ as well as the expense of the removal, is covered by insurance against direct loss by fire.

Fire Must be the Proximate Cause of the Damage.

The rule that the law looks at the proximate and not the remote cause of an injury applies as well to the law of insurance as to that of torts. There is, however, one exception to the application of the rule as it is ordinarily applied in the law of torts: The insurer is responsible for loss directly caused by fire, even though the fire may have been due to the negligence of the insured or of some third party; that is, even though negligence on the part of the plaintiff or his agent may have been the original cause of the loss.⁴⁰ With this one exception, in determining whether a given loss has been directly caused by fire the courts strictly apply the doctrine of proximate cause, which may be best defined by quoting the language of Mr. Justice Strong in a leading case:⁴¹ "The question always is, was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?" The application of this rule may well be illustrated by two leading cases. In *Lynn Gas & Electric Co. v. Meriden Fire Ins. Co.*,⁴² the policy in-

³⁹ *Witherell v. Insurance Co.*, 49 Me. 200; *Newmark v. Insurance Co.*, 30 Mo. 160, 77 Am. Dec. 608; *Leiber v. Insurance Co.*, 6 Bush (Ky.) 639, 99 Am. Dec. 695; *Whitehurst v. Insurance Co.*, 51 N. C. 352; *Independent Mut. Ins. Co. v. Agnew*, 34 Pa. 96, 75 Am. Dec. 638.

⁴⁰ "For instance, where the negligent act of the insured, or of anybody else, causes a fire, and so causes damage, although the negligent act is the direct proximate cause of the damage, through the fire, which was the passive agency, the insurer is held liable for a loss caused by the fire." *LYNN GAS & ELECTRIC CO. v. MERIDEN FIRE INS. CO.*, 158 Mass. 570, 33 N. E. 690, 20 L. R. A. 297, 35 Am. St. Rep. 540, Woodruff, Ins. Cas. 178, citing *JOHNSON v. INSURANCE CO.*, 4 Allen (Mass.) 388; *Walker v. Maitland*, 5 Barn. & Ald. 171; *WATERS v. INSURANCE CO.*, 11 Pet. (U. S.) 213, 9 L. Ed. 69; *PETERS v. INSURANCE CO.*, 14 Pet. (U. S.) 99, 10 L. Ed. 371; *GENERAL MUT. INS. CO. v. SHERWOOD*, 14 How. (U. S.) 351, 14 L. Ed. 452; *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. (U. S.) 44, 19 L. Ed. 65. But the insurer is not liable for a loss due to the intentional act of the insured or his agent. *WATERS v. INSURANCE CO.*, 11 Pet. (U. S.) 213, 9 L. Ed. 69. However, the insurance covers a loss due to the intentional act of an insane wife or of a stranger to the insured. *Union Ins. Co. v. McCullough* (Neb.) 96 N. W. 79.

⁴¹ *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U. S. 469, 474, 24 L. Ed. 256, quoted with approval by Knowlton, J., in *LYNN GAS & ELECTRIC CO. v. MERIDEN FIRE INS. CO.*, supra. In the latter case "proximate cause" is defined as the "active efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a new and independent source."

⁴² *LYNN GAS & ELECTRIC CO. v. MERIDEN FIRE INS. CO.*, 158 Mass.

sured the building and machinery of the insured against loss or damage by fire. A fire occurred in the wire tower, situate some distance from the building in which the dynamos and other electrical machines of the insured were placed. By reason of the burning of the wire tower a short circuit was formed. This caused a sudden increase of pressure upon the driving belt of the dynamo, which parted, and left the engine without restraint. The fly wheel, thus caused to revolve too rapidly, burst, and wrecked the machinery and building. It was contended by the defendant that the loss to the machinery and building was too remote to be covered by the insurance against fire. But the court held that there was an unbroken chain of causation between the fire in the tower and the wrecking of the building and machinery, and therefore held the insurer liable as for damage by fire.

In the second case, *Ermentrout v. Girard Fire & Marine Ins. Co.*,⁴³ the building of the insured was damaged by the falling of the wall of an adjacent house, which was on fire. No part of the insured building was actually burnt, but the court held that the damage suffered by the insured was due directly to the falling of the wall of the adjacent building, which was, in turn, caused by fire. So it has been held that damage to a building, due principally to the force of exploding gunpowder, was proximately due to a fire which caused the ignition of the gunpowder, and to the burning of the powder itself.⁴⁴

Hostile and Friendly Fires.

In determining the liability of the insurer against damage by fire, it is necessary to make a rather subtle distinction between fires that are hostile and those that are friendly in their origin. So long as a fire burns in a place where it was intended to burn, and ought to be, it is to be regarded as merely an agency for the accomplishment of some purpose, and not as a hostile peril. Thus, a fire burning in a furnace, or a stove, or a lamp, is considered a friendly fire; and damage that may be caused by such fires, due to their negligent management, is not considered to be within the terms of the policy. Thus, in the old case of *Austin v. Drew*,⁴⁵ the plaintiffs sought to hold an insurer against fire

570, 33 N. E. 690, 20 L. R. A. 297, 35 Am. St. Rep. 540, Woodruff, Ins. Cas. 178.

⁴³ *ERMENTROUT v. GIRARD FIRE & MARINE INS. CO.*, 63 Minn. 305, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St. Rep. 481, Woodruff, Ins. Cas. 184.

⁴⁴ *SCRIPTURE v. INSURANCE CO.*, 10 Cush. (Mass.) 356, 57 Am. Dec. 111, Richards, Ins. Cas. 439. Such losses are expressly excepted by the explosion clause of the standard policy.

In *Hartford Steam Boiler Inspection & Ins. Co. v. Henry Sonneborn & Co.*, 96 Md. 616, 54 Atl. 610, it was held that a policy against loss by explosion of steam boilers covered damage due to water escaping from an automatic sprinkler when melted by reason of escaped steam from a broken pipe.

⁴⁵ *AUSTIN v. DREW*, 6 Taunt. 435, 4 Camp. 360.

liable for injury done to a stock of sugar in process of refining, due to overheating from certain flues that were used in the process of manufacture. These flues, on account of the negligence of a servant of the plaintiff, became overheated, and thus caused the damage complained of, though no actual ignition took place. The court held, however, that such damage was not within the policy; that it was due rather to the negligent use of an agency employed in the manufacture of sugar than to "fire" in the sense in which the term was used in the policy of insurance. So it has been held that damage caused by smoke issuing from a lamp that is turned up too high,⁴⁶ or from a stove pipe that is defective,⁴⁷ is not to be considered as directly caused by fire. Neither would damage caused to furniture by an overheated stove be chargeable to the insurer. The principle underlying these cases is simply that the policy shall not be construed to protect the insured from injury consequent upon his negligent use or management of fire, so long as it is confined to the place where it ought to be.⁴⁸ But a friendly fire may become hostile by escaping from the place where it ought to be to some place in which it ought not to be. Therefore, where a fire in a chimney, due to the ignition of soot there, caused soot and smoke to issue from the stove so as to damage the property insured, the court very properly held the damage due to a hostile fire.⁴⁹ The fire was intended to burn in the stove and not in the chimney.

Excepted Causes of Loss.

The standard policy, like most other fire policies, contains a list of perils for which the underwriter is unwilling to assume liability, as follows: "This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon."⁵⁰

⁴⁶ *Samuels v. Insurance Co.*, 2 Pa. Dist. R. 397.

⁴⁷ *Cannon v. Insurance Co.*, 110 Ga. 563, 35 S. E. 775, 78 Am. St. Rep. 124.

⁴⁸ In *American Towing Co. v. German Fire Ins. Co.*, 74 Md. 25, 21 Atl. 553, it was held that a fire policy upon a tug and her fixtures did not cover damage done to a leaky boiler by the action of a too fierce fire in the furnace.

⁴⁹ *WAY v. INSURANCE CO.*, 166 Mass. 67, 43 N. E. 1032, 32 L. R. A. 608, 55 Am. St. Rep. 379.

⁵⁰ The standard "lightning clause" is as follows: "This policy shall cover any direct loss or damage caused by lightning, (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado, or wind storm,) not exceeding the sum insured,

The rates charged by underwriters for fire insurance are based upon the average percentage of loss under usual conditions. Consequently it is proper that the operation of the policy should be restricted to losses such as may happen under ordinary conditions, excluding those due to unusual and peculiarly destructive causes. It is attempted in this enumeration of excepted risks just quoted from the standard policy to include all such extraordinary causes of loss the presence of which might render unreliable the actuary's calculation of probabilities. The terms used should be construed in their ordinary and generally accepted sense, inasmuch as they are presumed so to have been used by the contracting parties. Thus "invasion" means the entrance of an armed force with hostile intent into a foreign territory.⁵¹ So the words "insurrection, riot, civil war or commotion," will include armed and violent opposition to law and government in all its various phases.⁵²

Military or Usurped Power.

Some courts have held that this expression is to be so construed as to make the word "usurped" qualify military, and thus to include within it only such acts of military power as are wrongfully and illegally exercised. But the Supreme Court has held that such a construction is unjustifiable. In the case of *Ætna Fire Ins. Co. v. Boon*⁵³ the insured property was destroyed by fire caused by the order of the commander of the Federal forces in his desire to prevent certain military stores from falling into the hands of the Confederate forces that were about to enter the town in which it was situated. It was held that this loss was within the exception in the policy, although caused by the lawful orders of the commander of the government troops. The Connecticut court had previously held otherwise.⁵⁴

Destruction by Order of Civil Authority.

In the absence of such a provision as that found in the standard policy the insurer is liable for property destroyed by order of civil authority, for the purpose of checking the progress of a fire, such loss

nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning, whether such other insurance be against direct loss by lightning or not."

⁵¹ *Portsmouth Ins. Co. v. Reynolds' Adm'r*, 32 Grat. (Va.) 613; *Ætna Fire Ins. Co. v. Boon*, 95 U. S. 117, 24 L. Ed. 395. See, also, *Royal Ins. Co. v. Martin*, 192 U. S. 149, 24 Sup. Ct. 247, 48 L. Ed. 385.

⁵² See *Lycoming Fire Ins. Co. v. Schwenk*, 95 Pa. 89, 40 Am. Rep. 629 (riot); *Spruill v. Insurance Co.*, 46 N. C. 126 (insurrection); *Portsmouth Ins. Co. v. Reynolds' Adm'r*, 32 Grat. (Va.) 613.

⁵³ 95 U. S. 117, 24 L. Ed. 395.

⁵⁴ *Boon v. Insurance Co.*, 40 Conn. 575.

being considered to be the proximate consequence of fire.⁵⁵ It is probable, however, that the courts will not be able to find any way of escaping the effect of the provision in the standard policy, which is undoubtedly intended to relieve the insurer from liability for any such cause.

Loss by Theft.

As stated above, in the absence of an express stipulation to the contrary, the insurer will be held liable for any such loss sustained by theft that occurs in consequence of removal of goods from the burned building to some place of safety, since such loss can be immediately traced to the fire as an efficient cause.⁵⁶ Claims for such losses are peculiarly difficult to test by the ordinary means within the power of the insurer, and are very wisely excluded.

Neglect of the Insured.

This exception is aimed at the bad faith of the insured rather than intended to secure a lessened risk to the insurer. The insured's own self-interest will prompt him to use all reasonable means to save his property, if he really desires it to be saved, without the stimulus of a contract, and his failure to do so would cast grave suspicion upon his good faith. Therefore the neglect of the insured in the premises, in order to bring the loss within this exception, must be such as in effect to show bad faith. Negligence on the part of his servants will not bring the loss within the exception.⁵⁷

Loss by Explosion.

Under the older policies, which did not except losses due to explosions, it was held that the insurer was liable for the full consequence of an explosion, provided there was present, as either the cause or the accompaniment of the explosion, actual fire.⁵⁸ But, under the exception as contained in the standard policy, all damage directly caused by explosion is excluded, although the insurer is liable for the damage actually done by a fire resulting from the explosion. It seems, however, that even under the standard policy the mere fact that an explosion takes place in a burning building will not bring the loss within this exception.⁵⁹ The efficient cause of the damage done in such case is

⁵⁵ CITY FIRE INS. CO. v. CORLIES, 21 Wend. 367, 34 Am. Dec. 258.

⁵⁶ See note 39, supra.

⁵⁷ Wertheimer-Swartz Shoe Co. v. United States Casualty Co., 172 Mo. 135, 72 S. W. 635, 61 L. R. A. 766, 95 Am. St. Rep. 500.

⁵⁸ See SCRIPTURE v. INSURANCE CO., 10 Cush. (Mass.) 356, 57 Am. Dec. 111, Richards, Ins. Cas. 439.

⁵⁹ Washburn v. Insurance Co. (C. C.) 2 Fed. 304; Washburn v. Insurance Co. (C. C.) 2 Fed. 633; Transatlantic Fire Ins. Co. v. Dorsey, 56 Mo. 70; Renshaw v. Insurance Co., 103 Mo. 609, 15 S. W. 949, 23 Am. St. Rep. 913. See, also, WATERS v. INSURANCE CO., 11 Pet. (U. S.) 213, 9 L. Ed. 691;

considered to be the fire, and not the explosion, which is merely the consequence of the fire. But, in order that this rule shall apply, the fire causing the explosion must be hostile, and not friendly. Thus, an explosion due to the ignition of vapor by coming in contact with a burning gas jet or lamp is not considered to be a consequence of fire.⁶⁰ So, where an employé of the insured struck a match in a cellar, thus causing gasoline vapor to explode and destroy the insured building, it was held that the loss was due proximately to the explosion, and was within the exception.⁶¹

Some difficulty is encountered in determining whether an explosion is the proximate or the remote cause of a loss in question, and some conflict is found in the decisions on the subject. Thus, it has been held by the Supreme Court of the United States that an explosion which took place in a building across the street from the one insured, causing a great conflagration, which spread to the insured premises through intermediate houses, was the proximate cause of the loss complained of, which was, therefore, not chargeable to the insurer.⁶² In some of the state courts, however, a different view has been taken of the scope of this exception. These courts consider that the exception includes only those losses that are caused proximately and immediately by the explosive forces, and not those due to fires originating from explosions.⁶³

Mitchell v. Insurance Co., 183 U. S. 42, 22 Sup. Ct. 22, 46 L. Ed. 74. But it has been held that, where the building insured was wrecked by an explosion caused by the burning of a neighboring structure, the explosion, and not the fire, was the proximate cause of the loss. Hustace v. Insurance Co., 175 N. Y. 292, 67 N. E. 592, 62 L. R. A. 651. See, also, Caballero v. Insurance Co., 15 La. Ann. 217.

⁶⁰ Briggs v. Insurance Co., 53 N. Y. 446; United Life, Fire & Marine Ins. Co. v. Foote, 22 Ohio St. 340, 10 Am. Rep. 735; Heuer v. Insurance Co., 144 Ill. 393, 33 N. E. 411, 19 L. R. A. 594.

⁶¹ Mitchell v. Insurance Co., 183 U. S. 42, 22 Sup. Ct. 22, 46 L. Ed. 74.

⁶² Louisiana Mut. Ins. Co. v. Tweed, 7 Wall. (U. S.) 44, 19 L. Ed. 65. Here the court said: "The explosion undoubtedly produced or set in operation the fire that burned the plaintiff's cotton. The fact that it was carried to the cotton by first burning another building supplies no new force or power which caused the burning."

⁶³ Heffron v. Insurance Co., 132 Pa. 580, 20 Atl. 698. In this case the court said that the exception "is to be restricted to losses arising from explosions, rather than extended to the much broader ground of losses by fire originating from explosions." See, also, Heuer v. Insurance Co., 144 Ill. 393, 33 N. E. 411, 19 L. R. A. 594.

The construction given to this exception by these courts is manifestly the more reasonable. It would be outrageous to hold that all the property owners who suffered loss in the recent Baltimore fire would be deprived of any benefit of their insurance in case it should be proved that that disastrous conflagration had its origin in some kind of explosion. Such a conflagration as the great Chicago fire might as easily have originated in a gunpowder ex-

Lightning.

The older cases held the insurer against loss by fire liable also for damage done by lightning, which they declared to be "fire from heaven."⁶⁴ Since, however, latter-day scientists have made clear to the judges the mundane origin of lightning, it is uniformly held that a loss due to lightning alone is not covered by a fire policy,⁶⁵ although, of course, damage done by fire caused by the lightning must be made good by the insurer.⁶⁶

Excepted Subjects of Loss.

The standard policy expressly excepts from the operation of the contract certain articles enumerated in the following condition:

"This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs."

The insurer declines to make himself liable for loss of such articles because their nature is such as to make their value largely a matter of irresponsible opinion, more apt to be based upon sentiment or fancy than upon the ordinary rules that fix commercial values. The language in which these exceptions are expressed will, however, be strongly construed in favor of the insured.⁶⁷ Thus, the terms "store or office furniture or fixtures" will be so limited as to include only those fixtures or furniture that are peculiar to offices or stores as such, and not all of their movable contents.⁶⁸ So, the expression "held on storage" will apply only to goods technically on storage. Goods that are kept on hand or in stock by merchants for sale,⁶⁹ or material kept by a

plosion at the hands of careless boys in a stable, as in the historic overturning of a lantern. In such a case the doctrine of *Louisiana Mut. Ins. Co. v. Tweed*, supra, would surely yield.

⁶⁴ *SCRIPTURE v. INSURANCE CO.*, 10 Cush. (Mass.) 356, 57 Am. Dec. 111, Richards, Ins. Cas. 439, citing 1 Emerigon, c. 12, § 17.

⁶⁵ *KENNISTON v. INSURANCE CO.*, 14 N. H. 341, 40 Am. Dec. 193; *Babcock v. Insurance Co.*, 4 N. Y. 326.

⁶⁶ *Babcock v. Insurance Co.*, 4 N. Y. 326.

⁶⁷ *GEORGIA HOME INS. CO. v. ALLEN*, 119 Ala. 436, 24 South. 399; *Liverpool & London & Globe Ins. Co. v. Kearney*, 180 U. S. 132, 21 Sup. Ct. 326, 45 L. Ed. 460; *Canton Ins. Office v. Woodside*, 90 Fed. 301, 33 C. C. A. 63.

⁶⁸ *Thurston v. Insurance Co. (C. C.)* 17 Fed. 127.

⁶⁹ *New York Equitable Ins. Co. v. Langdon*, 6 Wend. (N. Y.) 623; *Vogel v. Insurance Co.*, 9 Gray (Mass.) 23.

manufacturer,⁷⁰ or furniture stored away by a person intending to open a hotel in a building,⁷¹ will not be regarded as being on storage.

MEASURE OF INSURER'S LIABILITY.

176. THE ACTUAL CASH VALUE of the insured property at the time of loss is the limit of the insurer's liability at common law. The standard policy expressly so stipulates, and further limits the insurer's liability upon certain specified losses and risks.

177. PRO RATA CLAUSE—In case of concurrent insurance upon the property damaged, the underwriter is made liable only for such a proportion of the loss suffered as the amount insured by him bears to the total amount of insurance.

"This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy."

In accordance with the well-recognized principle that the contract of insurance is intended to afford merely indemnity for loss, the insured will, under the common law, under no circumstances be allowed to recover more than the actual value of his property at the time of the loss. Unless the policy is valued, the sum set forth on its face is intended merely as the maximum limit of the insurer's liability, not as the measure of it.⁷² Therefore, the stipulation found in the standard policy,

⁷⁰ *Vogel v. Insurance Co.*, 9 Gray (Mass.) 23.

⁷¹ *Continental Ins. Co. v. Pruitt*, 65 Tex. 125; *Home Ins. Co. v. Gwathmey*, 82 Va. 923, 1 S. E. 209.

⁷² In several states statutes have been passed imposing as a penalty on insurance companies unsuccessfully contesting claims made under their policies the payment of the insured's reasonable attorney's fees, and a certain percentage of the loss in addition to the sum otherwise payable. See Comp. St. Neb. 1903, c. 43, § 45; Civ. Code Ga. 1895, § 2140; Rev. St. Tex. 1895, § 3071. The constitutionality of these acts has been vigorously and persistently assailed, but unsuccessfully. The Supreme Court has upheld the constitutionality of such statutes in *Fidelity Mut. Life Ass'n v. Mettler*, 185 U. S. 308, 22 Sup. Ct. 662, 46 L. Ed. 922; *Iowa Life Ins. Co. v. Lewis*, 187 U. S. 335, 23 Sup. Ct. 126, 47 L. Ed. 204; *Farmers' & Merchants' Ins. Co. v. Dob-*

limiting the liability of the insurer to the actual cash value of the property damaged or destroyed, would seem to be more or less needless, since it adds nothing to the insurer's common-law rights, and is powerless to prevent the operation of valued policy statutes. The value of the property destroyed is ultimately a question for the jury, but the policy provides for an estimate to be made by appraisers. This provision will be considered later.⁷³ It will also be noted that the policy contains a rule for determining the value of property destroyed—that it shall in no event exceed what it would cost the insured to repair or replace the same with material of the same kind and like quality. This is substantially the rule by which juries fix the measure of the insured's damage.

Loss Occasioned by Municipal Regulations.

In the absence of the condition found in the standard policy as quoted in the note below,⁷⁴ the insurer will be liable for loss suffered by the owner of a building damaged by fire, by reason of building regulations of the municipality in which the building is situated, which may prohibit the reconstruction of buildings of the type insured, and thus transform a partial into a total loss.⁷⁵ Under the standard policy,

ney, 189 U. S. 301, 23 Sup. Ct. 565, 47 L. Ed. 821. And the same conclusion has been reached by all the state courts save that of Georgia. *Union Cent. Life Ins. Co. v. Chowning*, 86 Tex. 654, 26 S. W. 982, 24 L. R. A. 504; *Fidelity & Casualty Co. of New York v. Allibone*, 90 Tex. 660, 40 S. W. 399; *British America Assur. Co. v. Bradford*, 60 Kan. 82, 55 Pac. 335; *Insurance Co. of North America v. Bachler*, 44 Neb. 549, 62 N. W. 911; *Lancashire Ins. Co. v. Bush*, 60 Neb. 116, 82 N. W. 313; *Continental Fire Ins. Co. v. Whitaker* (Tenn. 1904) 79 S. W. 119.

The Georgia court was misled by *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, into holding such a statute unconstitutional. See *Phenix Ins. Co. v. Hart*, 112 Ga. 765, 38 S. E. 67; *Phenix Ins. Co. v. Schwartz*, 115 Ga. 113, 41 S. E. 240, 57 L. R. A. 752, 90 Am. St. Rep. 98.

⁷³ See post, § 178.

⁷⁴ "This company shall not be liable, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described."

⁷⁵ *Larkin v. Insurance Co.*, 80 Minn. 527, 83 N. W. 409, 81 Am. St. Rep. 286. In this case it was said: "These authorities lay down the rule that such ordinances are a part of the contract of insurance, and that the insurer is bound thereby. This is in line with the general doctrine that, where the parties contract upon a subject which is surrounded by statutory limitations and requirements, they are presumed to have entered into their engagements with reference to such statute, and the same enters into and becomes a part of such contract." Of course, under such circumstances the building will not be considered a total loss unless so badly damaged as to be practically

however, the insurer is clearly liable only for the sum that would be required to restore the property to its original condition if such restoration were allowed.

It is also to be observed that the standard policy carefully limits the liability of the insurer for such fragile and easily damaged articles as plate glass, frescoes, and decorations.

The Pro Rata Clause.

"This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon."

Under concurrent policies that do not contain a limitation of this kind, the insured may proceed against any one of the several insurers to recover, within the limit of his insurance, the whole amount of loss suffered, leaving the latter to prosecute his claim for contribution against his co-insurers in a separate proceeding.⁷⁶ It is to avoid such circuity of action, and to render settlements among co-insurers more easy and satisfactory, that the above condition is included within the standard policy. The condition will be enforced in accordance with its terms, even though it may work some hardship upon the insured.⁷⁷ In Pennsylvania, however, a rather peculiar doctrine has grown up, in accordance with which insurance is not deemed concurrent unless it is also co-extensive. Thus, where a policy was issued to cover only a part of property previously insured, it was held that, upon the destruc-

valueless without the repairs so prohibited; but in fixing the insurer's liability the value of the material remaining must be deducted from the total value of the uninjured building. *Id.*

⁷⁶ *Godin v. Assurance Co.*, 1 Burrows, 489; *Norwich Union Fire Ins. Soc. v. Wellhouse*, 113 Ga. 970, 39 S. E. 397. Of course, if the amount of loss should equal or exceed the total insurance, there could arise no question of prorating or contribution. Each insurer would be liable for the whole amount of his policy.

⁷⁷ The "whole insurance" of this condition is the sum of the face values of all the policies written upon the property in question. And in apportioning any loss all policies are to be included, even though some of them may give only partial indemnity, by reason of provisions making the insured co-insurer. *Farmers' Feed Co. v. Scottish Union & National Ins. Co.*, 173 N. Y. 241, 65 N. E. 1105; *Stephenson v. Insurance Co.*, 116 Wis. 277, 93 N. W. 19.

tion of the property covered by both policies, there could be no pro-rating of the loss, since the policies were not concurrent.⁷⁸

It has been recently held in Kentucky that a condition of a policy making the insured co-insurer, unless he maintained other insurance to a stipulated amount, was void as opposed to the valued policy laws of that state.⁷⁹

APPRAISAL AND ARBITRATION.

178. In case of dispute as to the value of property lost or damaged, it is stipulated that appraisers shall be appointed, who, with an umpire, shall make an award as to the amount of loss. Such an appraisal and award, when required, is made a condition precedent to any claim against the insurer. As such, it is valid, in the absence of statute providing otherwise.

"In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire."

This provision for a settlement of disputes as to the value of property destroyed, without a resort to litigation, is one much to be commended. But when made a condition precedent to bringing an action on the policy, as in the case of the standard policy, it is sometimes liable to abuse by the insurer, and has frequently been the cause of vexatious litigation.

It is well settled that a clause intended to refer to arbitration the whole question of the insurer's liability under the contract is void, as ousting the jurisdiction of the court.⁸⁰ If the matter referred is merely the amount of that liability, the condition is perfectly valid and will be enforced.⁸¹ If, by the terms of the policy, compliance with the con-

⁷⁸ *Meigs v. Insurance Co.*, 205 Pa. 378, 54 Atl. 1053; *Clarke v. Assurance Co.*, 146 Pa. 561, 23 Atl. 248, 15 L. R. A. 127, 28 Am. St. Rep. 821; *Sloat v. Insurance Co.*, 49 Pa. 14, 88 Am. Dec. 477. But see, contra, *OGDEN v. INSURANCE CO.*, 50 N. Y. 388, 10 Am. Rep. 492.

⁷⁹ *Sachs v. Insurance Co. (Ky.)* 67 S. W. 23. But see *Stephenson v. Insurance Co.*, 116 Wis. 277, 93 N. W. 19.

⁸⁰ *Phoenix Ins. Co. v. Zlotky (Neb.)* 92 N. W. 736; *German-American Ins. Co. v. Etherton*, 25 Neb. 505, 41 N. W. 406; *Hartford Fire Ins. Co. v. Hon (Neb.)* 92 N. W. 746, 60 L. R. A. 436; *Leach v. Insurance Co.*, 58 N. H. 245.

⁸¹ *Hamilton v. Insurance Co.*, 136 U. S. 242, 10 Sup. Ct. 945, 34 L. Ed. 419; *Hanover Fire Ins. Co. v. Lewis*, 28 Fla. 209, 10 South. 297; *Mentz v. Insur-*

dition and the return of an award is expressly made a condition precedent to the bringing of an action upon the policy, a failure on the part of the insured to submit the question in dispute to arbitration, as agreed, will be a good defense to an action on the policy.⁸² But if the agreement to submit to arbitration is not so expressly made a condition precedent, the insured may decline to comply with the condition, and maintain his suit on the policy, thus rendering himself liable for a breach of his collateral agreement to arbitrate.⁸³

As in the case of other awards, the award under this condition will not be binding unless it has been rendered strictly in accordance with the terms of its submission, and by arbitrators who have considered the evidence submitted in a fair and judicial manner. Thus, it was held that when the insurer, acting under this condition, fraudulently appointed his own agent to represent him, and this agent procured the selection of a person friendly to the insurer as umpire, the award returned by such a board of arbitrators was not binding upon the insured, who was allowed to maintain his action upon the policy, without reference to the award.⁸⁴

179. OPTION TO REBUILD—In order to protect the insurer against unfairness in the appraisal and award, or in the proofs of loss, the standard policy reserves to him the option to restore the property damaged, or to purchase it at the appraised valuation. An election by the insurer to rebuild or purchase gives rise to a new and fixed liability, which can be enforced by the insured in appropriate proceedings.

"It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described."

ance Co., 79 Pa. 478, 21 Am. Rep. 80; *Viney v. Bignold*, 20 Q. B. Div. 172; *Scott v. Avery*, 5 H. L. Cas. 811.

⁸² *Hamilton v. Insurance Co.*, 136 U. S. 242, 10 Sup. Ct. 945, 34 L. Ed. 419; *Fischer v. Insurance Co.*, 95 Me. 486, 50 Atl. 232, 85 Am. St. Rep. 428; *Randall v. Insurance Co.*, 10 Mont. 340, 25 Pac. 953, 24 Am. St. Rep. 50; *Caledonia Ins. Co. v. Traub*, 83 Md. 524, 35 Atl. 13.

⁸³ *HAMILTON v. INSURANCE CO.*, 137 U. S. 370, 11 Sup. Ct. 133, 34 L. Ed. 708, *Woodruff, Ins. Cas.* 194; *Birmingham Fire Ins. Co. v. Pulver*, 129 Ill. 329, 18 N. E. 804, 9 Am. St. Rep. 598; *Seward v. Rochester*, 109 N. Y. 164, 16 N. E. 348; *Collins v. Locke*, 4 App. Cas. 674.

⁸⁴ *Insurance Co. of North America v. Hegewald (Ind. Sup.)* 66 N. E. 902. And see *Kaiser v. Insurance Co.*, 172 N. Y. 663, 65 N. E. 1118; *Hall v. Assurance Co.*, 133 Ala. 637, 32 South. 257.

The insurer is also apt at times to suffer from the perverted valuation made by appraisers friendly to the insured, or by an award rendered by a packed board of arbitrators. While the insurer would have the same right to avoid the award or appraisal, if unfairly made, as would the insured, he would hardly be so successful in proving the fraud before a jury. Therefore, the insurer seeks to escape prejudice to his interests on account of unfair or fraudulent appraisers by reserving the option to take personal property damaged by fire at the valuation assigned to it by such appraisers,⁸⁵ or by the insured in his proof of loss, or to rebuild or repair any building that may have been damaged.⁸⁶ Thus the provision operates as a wholesome check upon the insured and his friends in estimating the value of damaged goods, and should be given a reasonable construction.

Insurer's Election to Rebuild.

The insurer must exercise his option to rebuild fairly, and within the time stipulated in the policy, or, in the absence of stipulation, within a reasonable time.⁸⁷ He must give unmistakable notice of his election to rebuild, and an election once made is irrevocable.⁸⁸ While the insurer may take advantage of repairs made by the insured before notice of election, yet he cannot do so if he has unfairly allowed the insured to proceed with repairs necessary to preserve the property from further damage, when the latter in good faith believed that the insurer did not intend himself to make repairs.⁸⁹ Upon elect-

⁸⁵ The insurer must elect to take the damaged goods within a reasonable time, which may be less than the stipulated thirty days. Thus, when the insured had given due notice of a loss, it was held that a sale of the damaged goods at auction eighteen days after the fire, and after public advertisement, the insurer meanwhile having shown no disposition to take the goods, constituted no defense to the insurer under this condition. *Davis v. Insurance Co.*, 158 N. Y. 688, 53 N. E. 1154.

⁸⁶ It is clear that such a right of option could not be claimed in the absence of agreement. *WYNKOOP v. INSURANCE CO.*, 91 N. Y. 478, 43 Am. Rep. 686, Woodruff, Ins. Cas. 203; *Hartford Fire Ins. Co. v. Peebles' Hotel Co.*, 27 C. C. A. 223, 82 Fed. 546, 54 U. S. App. 215; *COMMONWEALTH INS. CO. v. SENNETT*, 37 Pa. 205, 78 Am. Dec. 418.

⁸⁷ *Beals v. Insurance Co.*, 36 N. Y. 522; *Insurance Co. of North America v. Hope*, 58 Ill. 75, 11 Am. Rep. 48; *Kelly v. Sun Fire Office*, 141 Pa. 10, 21 Atl. 447, 23 Am. St. Rep. 254. It is competent for the insurer, as a defense, to show an extension of time allowed him by agreement with the insured. *Franklin Fire Ins. Co. v. Hamill*, 5 Md. 170; *Home Mut. Fire Ins. Co. v. Garfield*, 60 Ill. 124, 14 Am. Rep. 27; *Haskins v. Insurance Co.*, 5 Gray (Mass.) 432.

⁸⁸ A request for arbitration amounts to an election to pay money in satisfaction of the insured's claim; and such an election cannot be afterwards revoked. *Iowa Cent. Building & Loan Ass'n v. Merchants' & Bankers' Fire Ins. Co.*, 120 Iowa, 530, 94 N. W. 1100; *Fire Ass'n of Philadelphia v. Rosenthal*, 108 Pa. 474, 1 Atl. 303; *Heilmann v. Insurance Co.*, 75 N. Y. 7.

⁸⁹ *Eliot Five Cents Sav. Bank v. Commercial Assur. Co.*, 142 Mass. 145, 7 N. E. 550. And see *Beals v. Insurance Co.*, 36 N. Y. 522.

ing to rebuild, the former contract of insurance is discharged, and the parties are deemed to have made a new agreement, under which the insurer undertakes to restore the building to its former condition.⁹⁰ Therefore, after such election, the insured cannot bring any action upon the policy,⁹¹ nor can the insurer claim the benefit of any conditions in the policy, unless it be by reason of a ground of forfeiture, of which he had no knowledge at the time of making his election.⁹² Unless the policy has limited the cost of rebuilding to the amount of the insurance, the insurer, after electing to rebuild, can be compelled to perform his undertaking, even though the cost may exceed the original amount of insurance.⁹³

AS AFFECTED BY VALUED POLICY LAWS.

180. When the standard form is used in those states in which a standard policy has not been adopted, any terms or conditions repugnant to local statutes are invalid. Of especial importance are the so-called "valued policy laws," existing in many states, which are held to make invalid those provisions of the standard form for determining the value of property totally destroyed, for arbitration in case of total loss, and for repairing and rebuilding under the same conditions.

In nearly half the states of the Union, statutes have been enacted which provide that the amount of insurance written on the face of the policy, and upon which premiums are paid, shall be conclusively presumed to be the value of insured realty in case of a total loss, provided there has been no depreciation between the time of writing the policy and the time of the loss, and also provided that the insured has practiced no fraud upon the insurer in overvaluing the property. These are the usual provisions of such statutes, although their terms vary

⁹⁰ *WYNKOOP v. INSURANCE CO.*, 91 N. Y. 478, 43 Am. Rep. 686, Woodruff, Ins. Cas. 203; *Hartford Fire Ins. Co. v. Peebles' Hotel Co.*, 27 C. C. A. 223, 82 Fed. 546, 54 U. S. App. 215; *Morrell v. Insurance Co.*, 33 N. Y. 429, 88 Am. Dec. 396; *Beals v. Insurance Co.*, 36 N. Y. 522.

⁹¹ *Hartford Fire Ins. Co. v. Peebles' Hotel Co.*, 27 C. C. A. 223, 82 Fed. 546, 54 U. S. App. 215. In this case the insured was allowed to sue for damages owing to the inferior material used by the insurers in repairing the insured's building. *Beals v. Insurance Co.*, 36 N. Y. 522. Here the insured was not allowed to recover on his policy because he refused to permit the insurers to rebuild, which right they claimed by virtue of their policy.

⁹² *WYNKOOP v. INSURANCE CO.*, 91 N. Y. 478, 43 Am. Rep. 686; *Bersche v. Insurance Co.*, 31 Mo. 546.

⁹³ *Morrell v. Insurance Co.*, 33 N. Y. 429, 88 Am. Dec. 396; *Fire Ass'n of Philadelphia v. Rosenthal*, 108 Pa. 474, 1 Atl. 303; *Hartford Fire Ins. Co. v. Peebles' Hotel Co.*, 27 C. C. A. 223, 82 Fed. 546, 54 U. S. App. 215; *Heilmann v. Insurance Co.*, 75 N. Y. 7; *Stamps v. Insurance Co.*, 77 N. C. 209, 24 Am. Rep. 443; *Home Mut. Fire Ins. Co. v. Garfield*, 60 Ill. 124, 14 Am. Rep. 27.

considerably in the different states.⁹⁴ These statutes have been held to be constitutional, and not to interfere with the freedom of contract.⁹⁵

All insurances effected under the standard form of policy in the states in which these laws exist are necessarily subject to them. In fact, the provisions of these laws become as fully a part of the contracts as if set forth in terms in the policies,⁹⁶ and all conditions and terms in the standard policy which are in any wise repugnant to the provisions of such statutes are invalid.⁹⁷ The provisions of these statutes are held to be in the interest of the public at large, and not merely for the benefit of the insured.⁹⁸ Hence they cannot be waived by him. An

⁹⁴ The Kentucky valued policy law may be here given as an example (Ky. St. 1903, § 700): "That insurance companies that take fire or storm risks on real property in this commonwealth shall, on all policies issued after this act takes effect (in case of total loss thereof by fire or storm), be liable for the full estimated value of the property insured, as the value is fixed in the face of the policy; and in cases of partial loss of the property insured, the liability of the company shall not exceed the actual loss of the party insured: provided, that the estimated value of the property insured may be diminished to the extent of any depreciation in the value of the property occurring between the dates of the policy and the loss: and provided further, that the insured shall be liable for any fraud he may practice in fixing the value of the property, if the company be misled thereby."

⁹⁵ *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552, affirming 136 Mo. 382, 38 S. W. 85, 35 L. R. A. 227, 58 Am. St. Rep. 638; *Dugger v. Insurance Co.*, 95 Tenn. 245, 32 S. W. 5, 28 L. R. A. 796; *Aetna Ins. Co. v. Tucker* (Tenn.) 32 S. W. 9.

⁹⁶ *OSHKOSH GASLIGHT CO. v. GERMANIA FIRE INS. CO.*, 71 Wis. 454, 37 N. W. 819, 5 Am. St. Rep. 233; *Reilly v. Insurance Co.*, 43 Wis. 449, 28 Am. Rep. 552; *Milwaukee Mechanics' Ins. Co. v. Russell*, 65 Ohio St. 230, 62 N. E. 338, 56 L. R. A. 159.

⁹⁷ *Thompson v. Insurance Co.*, 45 Wis. 388; *Insurance Co. of North America v. Bachler*, 44 Neb. 549, 62 N. W. 911; *Home Fire Ins. Co. v. Bean*, 42 Neb. 537, 60 N. W. 907; *Hartford Fire Ins. Co. v. Bourbon Co. Ct.*, 24 Ky. Law Rep. 1850, 72 S. W. 739; *Hickerson v. Insurance Co.*, 96 Tenn. 193, 33 S. W. 1041, 32 L. R. A. 172; *Dugger v. Insurance Co.*, 95 Tenn. 245, 32 S. W. 5, 28 L. R. A. 796; *Reilly v. Insurance Co.*, 43 Wis. 449, 28 Am. Rep. 552; *Queen Ins. Co. v. Leslie*, 47 Ohio St. 409, 24 N. E. 1072; *OSHKOSH GASLIGHT CO. v. GERMANIA FIRE INS. CO.*, 71 Wis. 454, 37 N. W. 819, 5 Am. St. Rep. 233; *Havens v. Insurance Co.*, 123 Mo. 403, 27 S. W. 718, 26 L. R. A. 107, 45 Am. St. Rep. 570. In this case it was held that an agreement to consider real property as personal property was invalid. *Milwaukee Mechanics' Ins. Co. v. Russell*, 65 Ohio St. 230, 62 N. E. 338, 56 L. R. A. 159; *Bammessel v. Insurance Co.*, 43 Wis. 463. In this case the insured was allowed to recover the face value of his policy, that being the damages agreed upon by the parties, although he knowingly and intentionally stated the cash value of his property to be greater than it actually was, which, by virtue of one of the conditions in his policy, was to cause a forfeiture. To the same effect see *Cayon v. Insurance Co.*, 68 Wis. 510, 32 N. W. 540.

⁹⁸ *Queen Ins. Co. v. Leslie*, 47 Ohio St. 409, 24 N. E. 1072; *Thompson v.*

attempted waiver is absolutely void.⁹⁹ Most of the provisions of the standard policy intended to fix the amount of the insurer's liability for a total loss are invalid in the states in which these valued policy laws exist. Thus, it has been held that the condition limiting the liability of the insurer to the cash value of the property at the time of the loss is void.¹⁰⁰ So is the condition giving the insurer his option to rebuild, as being repugnant to the provision of the statute fixing the liability of the insurer at the amount named on the face of the policy.¹⁰¹ In those states in which valued policy laws do not exist, the question of whether a total loss has been suffered or not may be submitted to the arbitrators, as well as the amount of damage suffered when the loss was only partial.¹⁰² But under the valued policy acts it is held that the submission of the question whether a total loss has been suffered in any given case is, in effect, to submit to the arbitrators the question of the insurer's liability, thus ousting the jurisdiction of the courts.¹⁰³ Hence in those states the arbitration condition of the standard policy is valid as to partial losses, but not as to a total loss.

A total loss of the insured building exists when the result of the fire is such as to render the property wholly unfit for use as a building, however valuable it may be as mere material. Or, to put it otherwise,

Insurance Co., 45 Wis. 388; *Pennsylvania Ins. Co. v. Drackett*, 63 Ohio St. 41, 57 N. E. 962, 81 Am. St. Rep. 608.

⁹⁹ *Reilly v. Insurance Co.*, 43 Wis. 449, 28 Am. Rep. 552; *Queen Ins. Co. v. Leslie*, 47 Ohio St. 409, 24 N. E. 1072; *Pennsylvania Ins. Co. v. Drackett*, 63 Ohio St. 41, 57 N. E. 962, 18 Am. St. Rep. 608.

¹⁰⁰ *Hartford Fire Ins. Co. v. Bourbon Co. Ct.*, 24 Ky. Law Rep. 1850, 72 S. W. 739. Also, see *Queen Ins. Co. v. Leslie*, 47 Ohio St. 409, 24 N. E. 1072; *Hickerson v. Insurance Co.*, 96 Tenn. 193, 33 S. W. 1041, 32 L. R. A. 172; *Dugger v. Insurance Co.*, 95 Tenn. 245, 32 S. W. 5, 28 L. R. A. 796.

¹⁰¹ *Hartford Fire Ins. Co. v. Bourbon Co. Ct.*, 24 Ky. Law Rep. 1850, 72 S. W. 739; *Milwaukee Mechanics' Ins. Co. v. Russell*, 65 Ohio St. 230, 62 N. E. 338, 56 L. R. A. 159. But see, contra, *Temple v. Insurance Co.*, 109 Wis. 372, 85 N. W. 361.

¹⁰² *Williamson v. Insurance Co.*, 58 C. C. A. 241, 122 Fed. 59; *Rutter v. Insurance Co. (Ala.)* 35 South. 33; *Chippewa Lumber Co. v. Phenix Ins. Co.*, 80 Mich. 116, 44 N. W. 1055; *Adams v. Insurance Co.*, 85 Iowa, 6, 51 N. W. 1149.

¹⁰³ This is soundly held, since, in case of total loss, the liability of the insurer is fixed by statute. *Hartford Fire Ins. Co. v. Bourbon Co. Ct.*, 24 Ky. Law Rep. 1850, 72 S. W. 739; *Thompson v. Insurance Co.*, 43 Wis. 459. Nor does consent to arbitrate estop the insured to claim a total loss as provided for by statute. *Pennsylvania Fire Ins. Co. v. Drackett*, 63 Ohio St. 41, 57 N. E. 962, 81 Am. St. Rep. 608. And see *Merchants' Ins. Co. v. Stephens*, 22 Ky. Law Rep. 999, 59 S. W. 511; *Home Fire Ins. Co. v. Bean*, 42 Neb. 537, 60 N. W. 907; *Daggs v. Insurance Co.*, 136 Mo. 382, 38 S. W. 85, 35 L. R. A. 227, 58 Am. St. Rep. 638; *Seyk v. Insurance Co.*, 74 Wis. 67, 41 N. W. 443, 3 L. R. A. 523. In this case the jury deducted from the insurance the value of the brick and other material left from the building burned. *Queen Ins. Co. v. Leslie*, 47 Ohio St. 409, 24 N. E. 1072.

if any portion of the building left standing could be utilized by a judicious builder in the proper restoration of the building, the loss is not total; but when the standing walls are in such a condition that the owner, in deciding to rebuild, apart from any question of insurance, would tear the walls down to the level of the foundation, a total loss is said to exist, however imposing may be the appearance of the ruins.¹⁰⁴

DOCUMENTS MADE PART OF CONTRACT BY REFERENCE.

181. The provisions of the standard policy making surveys, etc., referred to in the policy, or regulations of a mutual company, part of the contract, do not add anything to the legal effect of such references and regulations, save in constituting such surveys, etc., warranties.

"If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured. * * * If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto."

As we have already seen in a preceding chapter,¹⁰⁵ plans, surveys, and other documents descriptive of the risk may be made a part of the contract by proper reference. Therefore the condition above quoted

¹⁰⁴ *Hartford Fire Ins. Co. v. Bourbon Co. Ct.*, 24 Ky. Law Rep. 1850, 72 S. W. 739; *Pennsylvania Fire Ins. Co. v. Drackett*, 63 Ohio St. 57, 57 N. E. 962, 81 Am. St. Rep. 608; *Corbett v. Insurance Co.*, 155 N. Y. 389, 50 N. E. 282, 41 L. R. A. 318; *Havens v. Insurance Co.*, 123 Mo. 403, 27 S. W. 713, 26 L. R. A. 107, 45 Am. St. Rep. 570; *German Fire Ins. Co. v. Eddy*, 36 Neb. 461, 54 N. W. 856, 19 L. R. A. 707; *Seyk v. Insurance Co.*, 74 Wis. 67, 41 N. W. 443, 3 L. R. A. 523; *Palatine Ins. Co. v. Weiss*, 22 Ky. Law Rep. 994, 59 S. W. 509; *Royal Ins. Co. v. McIntyre*, 90 Tex. 170, 37 S. W. 1068, 35 L. R. A. 672, 59 Am. St. Rep. 797. In this case the court said, if any part of the building is standing after the fire, the rule applied to ascertaining if it is a total loss or not is whether or not such remaining portions would be utilized by a "reasonably prudent owner," who was uninsured, in restoring the building to its original condition. But see *O'Keefe v. Insurance Co.*, 140 Mo. 558, 41 S. W. 922, 39 L. R. A. 819. It was said that a total loss existed even if the portions of the walls which remained standing could be utilized, if to utilize them would cost as much as building them anew. *Oshkosh Packing & Provision Co. v. Mercantile Ins. Co. (C. C.)* 31 Fed. 200; *Insurance Co. of North America v. Bachler*, 44 Neb. 549, 62 N. W. 911; *Home Fire Ins. Co. v. Bean*, 42 Neb. 537, 60 N. W. 907; *Hamburg-Bremen Fire Ins. Co. v. Garlington*, 66 Tex. 103, 18 S. W. 337, 59 Am. Rep. 613; *Huck v. Insurance Co.*, 127 Mass. 306, 34 Am. Rep. 373.

¹⁰⁵ See ante, p. 183.

probably does not add anything to the binding effect of such a reference, for it has been held that such documents do not, under this clause, become a part of the contract, unless the reference is such as to indicate the intention of the parties that they should be so made.¹⁰⁶ Likewise, the provision making the regulations of mutual companies, as attached to the policy, a part thereof, amounts to nothing more than incorporating such regulations into the contract by reference.

AUTHORITY OF AGENTS—WAIVERS.

182. The provisions limiting the powers of agents of the insurer operate merely as notice to the insured of the limitations upon such powers, and are binding only in so far as they are kept true in fact. Likewise, restrictions imposed upon the methods and power of waiving conditions have no further effect than to give notice of the existence of such restrictions if they actually exist.

"In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company."

"This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for."

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

Principles covering the determination of the extent of the authority of insurance agents, and of their right to waive conditions of the policy, have already been fully treated.¹⁰⁷ It may be stated here, however, that the condition in the standard policy stipulating that "no person shall be agent of the insurer unless authorized in writing" has no contractual significance whatever. It does amount to notice to the insured,

¹⁰⁶ See *Vilas v. Insurance Co.*, 72 N. Y. 590, 28 Am. Rep. 186; *La Belle v. Insurance Soc.*, 34 N. B. 515.

¹⁰⁷ See ante, p. 322.

and, as such, is binding on him, if true; otherwise not. The same general statement may be made with regard to the limitations imposed by the policy upon the power of any representative of the company to waive any of its conditions except in the prescribed manner. Such limitations are operative only so far as they are kept true. If any agent has been in fact given power to waive this stipulation, it becomes immaterial.¹⁰⁸

The stipulation that the company shall not be deemed to have waived a right to claim a forfeiture by taking part in a tentative effort to adjust the loss is a reasonable and valuable provision, inasmuch as, in its absence, some states have held that such a participation by the insurer in attempting to adjust the loss constituted a waiver of any known condition of forfeiture.¹⁰⁹

CANCELLATION OF POLICY.

183. Under the cancellation clause of the standard policy, the policy is terminated, as a contract, upon the expiration of the five days after notice of an election to cancel. No act of cancellation is necessary, though it has been held otherwise; nor, by the better authority, is the return of the unearned premium a condition precedent to cancellation.

"This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium."

The cancellation clause of the standard form of policy seems so clearly worded that one is surprised to see that disputes have arisen as to its construction. It is held by the better authority that, after the expiration of the five-days notice required in case the cancellation is by the company, the insurance is deemed to be terminated and inoperative, without further act on the part of the insurer or any actual cancellation of the policy.¹¹⁰ The Kentucky court, however, in its zeal to protect the insured, has recently decided that this condition requires of the in-

¹⁰⁸ See ante, p. 324. Also, *Virginia Fire & Marine Ins. Co. v. Richmond Mica Co.* (Va. 1904) 46 S. E. 463.

¹⁰⁹ *Liverpool, London & Globe Ins. Co. v. Verdier*, 33 Mich. 138.

¹¹⁰ *Schwarzschild & Sulzberger Co. v. Phoenix Ins. Co.*, 124 Fed. 52, 59 C. A. 572. In this case a telegraphic notice was held to terminate the policy five days thereafter, although the policy had not been surrendered or the pro rata premium repaid.

surer desiring to terminate the insurance that he shall first cancel the policy and return the pro rata premium, when the insurance will be terminated after five days' notice of such cancellation.¹¹¹ Such a construction seems to stretch the language of the condition almost beyond recognition.

By the weight of authority the repayment of the unearned premium is not, under the standard policy, a condition precedent to the termination of the insurance by the insurer.¹¹² Such repayment becomes due only upon surrender of the policy. The New York Court of Appeals has, however, in a very unsatisfactory opinion, adopted the contrary rule.¹¹³

The right to cancel, being derived only from the contract, must be exercised strictly in accordance with the terms of the contract. Nothing less will terminate the insurance without the consent of the other party.¹¹⁴ The notice given must be in the form of an explicit notification, not of a request or of a general expression of intention;¹¹⁵ and it must be given to the insured or to his agent authorized to receive such notice.¹¹⁶ It must also be given in good faith.¹¹⁷ Of course, no right of cancellation exists after a loss.¹¹⁸

¹¹¹ *Continental Ins. Co. v. Daniel* (Ky.) 78 S. W. 866.

¹¹² *Schwarzschild & Sulzberger Co. v. Phoenix Ins. Co.*, 124 Fed. 52, 59 C. A. 572; *El Paso Reduction Co. v. Hartford Fire Ins. Co.* (C. C.) 121 Fed. 937; *Newark Fire Ins. Co. v. Sammons*, 11 Ill. App. 230.

¹¹³ *Tisdell v. Insurance Co.*, 155 N. Y. 163, 49 N. E. 664, 40 L. R. A. 765; following *Nitsch v. Insurance Co.*, 152 N. Y. 635, 46 N. E. 1149.

¹¹⁴ *Wicks Bros. v. Scottish Union & National Ins. Co.*, 107 Wis. 606, 83 N. W. 781.

¹¹⁵ *JOHN R. DAVIS LUMBER CO. v. HARTFORD INS. CO.*, 95 Wis. 226, 70 N. W. 84, 37 L. R. A. 131. See, also, *State Ins. Co. v. Hale* (Neb.) 95 N. W. 473, in which an illegible notice was held insufficient.

¹¹⁶ *Edwards v. Insurance Co.*, 101 Mo. App. 45, 73 S. W. 886. But the unauthorized act of an agent in consenting to cancellation is ratified by the insured when he accepts a substitute policy in place of the one canceled. *Larsen v. Insurance Co.* (Ill.) 70 N. E. 81; *Arnfeld v. Assurance Co.*, 172 Pa. 605, 34 Atl. 580.

¹¹⁷ Thus, an attempted cancellation upon the approach of a conflagration, and when the insured property was in imminent danger, would not avail the insurer, though complying with the letter of the contract. See *Home Ins. Co. v. Heck*, 65 Ill. 111.

¹¹⁸ *Massasolet Steam Mills Co. v. Western Assur. Co.*, 125 Mass. 110.

NOTICE AND PROOFS OF LOSS.

184. **NOTICE OF LOSS** is held to be "immediate," within the requirement of the standard policy, when it is given as soon after the fire as is reasonably possible under existing circumstances, in the exercise of due diligence.
185. **PROOFS OF LOSS** satisfactory to the insurer are required to be given. But the insurer must be satisfied when the insured has done all in his power to furnish the information stipulated for in the policy. It is the duty of the dissatisfied insurer to indicate the defects in the proofs of loss as given, so that the deficiencies may be supplied. His retention of the defective proofs constitutes a waiver of his objections.
186. The insurer's denial of all liability under the policy constitutes a waiver of his right to receive proofs of loss.
187. The requirement of the standard policy that proofs of loss shall be given within sixty days is, by the better authority, not a condition precedent, the breach of which defeats all rights of the insured under the policy. Time is not regarded as of the essence of the condition, which is to be construed as suspending the right of action until the expiration of the specified period after receipt by the insurer of satisfactory proofs of loss.
188. Failure to give notice and proofs of loss as required will be excused when it is due to the death or incapacity of the insured, or to any other circumstance rendering compliance with the condition impossible.
189. Notice and proofs of loss can be given to any agent of the insurer expressly or impliedly authorized to receive them. They are to be given by the insured himself, or, it seems, if he is dead, absent, or incapacitated, by some one in his behalf.

The lengthy provisions of the standard policy requiring notice and proofs of loss are set forth in the note below.¹¹⁹

¹¹⁹ "If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; * * *

General Purpose and Nature of Conditions.

It should be first observed by the reader that these conditions, while in the form of conditions precedent, are in nature conditions subsequent, the breach of which affects a right that has already accrued. Until a loss occurs through a peril covered by the policy, the insurer incurs no liability under his contract, but with the happening of the capital fact of loss his liability arises and becomes properly fixed. All those conditions of the policy making requirements of the insured after the loss are intended merely for evidential purposes, and do not properly form any part of the conditions of liability. That the insurer should have the evidence that he stipulates for is most reasonable and proper, and it is also reasonable that he should be allowed to stipulate for a penalty to be imposed upon the insured if he fails to give the evidence required by the contract. But all of these conditions concern matters after the loss. When they contain provisions of forfeiture they must be regarded as penalties defeating a right that has already accrued. Such being the nature of these conditions, it is manifest that the general rules of construction require that they shall be construed with much less strictness than those conditions that operate prior to the loss. A condition subsequent should never be construed as defeating an already vested right, unless the intention of the parties to create a forfeiture is unquestionable. In accordance with these principles, we find the majority of the courts most unwilling to give such a construction to these subsequent conditions as will defeat the rights of the insured, unless the facts of the case show fraud or clear injustice to the insurer.

This provision of the standard policy requires that notice in writing of the fire shall be given immediately, and that a carefully drawn statement describing the character and extent of the loss, and sworn to by the insured, shall be given within sixty days after the fire. The requirement of notice is intended merely to give the insurer information upon which he may act promptly in protecting the property from further loss for which he may be liable, or to enable him to take any other immediate steps that his interests may require. The statement of loss is, however, a very much more formal requirement, and intended not only to give the insurer information by which he may determine the extent of his liability, but also to afford to him a means of detecting

and the loss shall not become payable until after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required. * * *

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

any fraud that may have been practiced upon him, and to operate as a check upon extravagant claims.

Immediate Notice of Loss.

We may easily derive, from the principles stated above, the rule that the courts construe the requirement of immediate notice liberally in favor of the insured. In using the term "immediate" the parties clearly do not intend to impose upon the insured any impossible requirements, and therefore notice will be considered as immediate if it has been given as soon as circumstances permitted the insured, in the exercise of reasonable diligence, to communicate it. The question of whether, in any given case, notice has been given within such reasonable time as to be immediate, is for the jury,¹²⁰ although there may be some cases in which the delay is so clearly unreasonable as to make the breach of condition a question of law.¹²¹ No rule can be given fixing even approximately a time which shall be deemed to be reasonable for all cases. Thus, it has been held that a delay of fifty-three days in giving notice of loss was excusable, and not a breach of this condition, in a case in which the policy had come into the hands of an assignee and had been lost at the time of the fire. The assignee, not having before him the policy, and being ignorant of its conditions, was unable to give notice until the policy was found some fifty days after the fire. The notice given within three days after such discovery was considered to be immediate, within the condition of the policy.¹²² In this case, however, it was proved that the insurer had actual notice of the fire on the day that it had occurred. So, it has been held that a delay of thirty-five days, when excusable under the circumstances, might not be considered a breach of this condition.¹²³ In other cases it has been held that a delay of eleven days,¹²⁴ or even of forty-eight hours,¹²⁵ without sufficient reason, constituted a breach of this condition requiring immediate notice. Conditions in other forms of policies requiring that notice be given "forthwith," or "as soon as possible," are likewise construed to mean that the notice shall be given within a reasonable time.¹²⁶

¹²⁰ *Solomon v. Insurance Co.*, 160 N. Y. 595, 55 N. E. 279, 46 L. R. A. 682, 73 Am. St. Rep. 707; *Fletcher v. Insurance Co.*, 79 Minn. 337, 82 N. W. 647.

¹²¹ *ERMENTROUT v. INSURANCE CO.*, 63 Minn. 305, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St. Rep. 481, *Woodruff, Ins. Cas.* 487.

¹²² *Solomon v. Insurance Co.*, 160 N. Y. 595, 55 N. E. 279, 46 L. R. A. 682, 73 Am. St. Rep. 707.

¹²³ *Knickerbocker Ins. Co. v. McGinnis*, 87 Ill. 70.

¹²⁴ *Trask v. Insurance Co.*, 29 Pa. 198, 72 Am. Dec. 622.

¹²⁵ *Brown v. London Assur. Co.*, 40 Hun, 101.

¹²⁶ See *Mason v. Insurance Co.*, 82 Minn. 336, 85 N. W. 13, 83 Am. St. Rep. 433; *CENTRAL CITY INS. CO. v. OATES*, 86 Ala. 558, 6 South. 83, 11 Am. St. Rep. 67; *Harnden v. Insurance Co.*, 164 Mass. 382, 41 N. E. 658, 49 Am. St. Rep. 467. A requirement that proofs of loss should be furnished "forth-

Since notice of loss is required merely for the purpose of giving information to the insurer, the insurer who has in some other way obtained full information of the happening of the loss cannot complain that he has not received formal notice. The requirement that the notice shall be in writing will not be strictly enforced. Thus, if the insurer sends an adjuster immediately after the fire to look into the extent of the loss, he cannot afterwards be heard to claim that he had no notice of the loss.¹²⁷

When no Policy has Issued.

As we have seen above, oral insurances are valid and enforceable. They generally, however, contemplate the subsequent issue of a policy. There is a difference of opinion as to whether one who has insured under an oral contract is obliged to give notice or proofs of loss in accordance with conditions of the contemplated policy. By the weight of authority, however, the insured is not chargeable with knowledge of and assent to the conditions of the policy which he has never received.¹²⁸ Certainly, if the insurer denies liability upon the contract, and refuses to deliver the policy as agreed, it would seem that the insured should not rest under any obligation to comply with the conditions thus repudiated by the insurer.¹²⁹ The contrary has recently been held in New York, but this decision, by a divided court, would seem to be clearly mistaken.¹³⁰

Proofs of Loss must be Satisfactory.

The standard policy sets forth with much detail and precision the duties of the insured after the occurrence of a fire. These include the rendering, within sixty days after the fire, of a sworn statement upon numerous specified subjects connected with the insurance and the loss. If it is possible for the insured to give all the information that he has agreed to give, he must do so before he can be entitled to hold the insurer liable for the loss that has occurred.¹³¹ If the statement as ren-

with" was held to be satisfied, under the circumstances of the case, by rendering such proofs eighteen days after the fire. *Rines v. Insurance Co.*, 78 Minn. 46, 80 N. W. 839.

¹²⁷ *Partridge v. Insurance Co.*, 162 N. Y. 597, 57 N. E. 1119.

¹²⁸ *Taylor v. Insurance Co.*, 9 How. (U. S.) 390, 13 L. Ed. 187; *Wooddy v. Insurance Co.*, 31 Grat. (Va.) 362, 31 Am. Rep. 732; *Gold v. Insurance Co.*, 73 Cal. 216, 14 Pac. 786; *Nebraska & Iowa Ins. Co. v. Seivers*, 27 Neb. 541, 43 N. W. 351. But see, contra, *Barre v. Insurance Co.*, 76 Iowa, 609, 41 N. W. 373.

¹²⁹ *Weeks v. Insurance Co.*, 29 Fed. Cas. 581, No. 17,353; *CAMPBELL v. INSURANCE CO.*, 73 Wis. 100, 40 N. W. 661; *Balle v. Insurance Co.*, 73 Mo. 371.

¹³⁰ *HICKS v. ASSURANCE CO.*, 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424.

¹³¹ *Parks v. Insurance Co.*, 106 Iowa, 402, 76 N. W. 743; *Buffalo Loan,*

dered by the insured does not contain all the information that the policy requires to be given, and which it is in the power of the insured to give, the insurer has a right to reject the statement as insufficient.¹³² But it is his duty to make his objections promptly and specifically, so as to give the insured an opportunity to make such corrections as will render the statement satisfactory. If the insurer fails to make his objection within due time, and retains the statement, he will be deemed to have waived his right to object.¹³³

While the insurer has a right to reject the proofs of loss if they are not satisfactory, he may not set up for himself an arbitrary standard of satisfaction. The courts will deem the proofs satisfactory to the insurer if, under all the circumstances, the insurer ought to have been satisfied with them.¹³⁴ Substantial compliance with the requirements will always be deemed sufficient, even though there may be immaterial literal defects in the statement rendered. Accordingly, when it has become impossible, for any reason, to give information stipulated for, the failure to give that information will not render the statement of loss defective.¹³⁵ Thus, a failure on the part of the insured to make a complete inventory of goods damaged by fire was held not to make the statement of loss insufficient, where a portion of the goods had been entirely destroyed, so that it was impossible for them to be listed, and the remainder of the damaged goods had already been inventoried by representatives of the insurer and the insured.¹³⁶ And a failure to include in the statement two policies covering the property destroyed, which had been offered to the insured but refused, was held not to constitute a breach of the requirement that "all other insurance, whether valid or not, covering any of the said property," should be reported.¹³⁷ So, the stipulation that "the interest of the insured and of all others in the property" shall be stated is satisfied by a statement of the interest at the time of the fire, even though a change may have taken place in that interest subsequently.¹³⁸

Trust & Safe-Deposit Co. v. Knights Templar & Masonic Mut. Aid Ass'n, 126 N. Y. 450, 27 N. E. 942, 22 Am. St. Rep. 839.

¹³² Buffalo Loan, Trust & Safe-Deposit Co. v. Knights Templar & Masonic Mut. Aid Ass'n, 126 N. Y. 450, 27 N. E. 942, 22 Am. St. Rep. 839; Fowle v. Insurance Co., 122 Mass. 191, 23 Am. Rep. 308.

¹³³ Welsh v. Assurance Co., 151 Pa. 607, 25 Atl. 142, 31 Am. St. Rep. 786.

¹³⁴ Braker v. Association, 27 App. Div. 234, 50 N. Y. Supp. 547; Flynn v. Association, 152 Mass. 288, 25 N. E. 716.

¹³⁵ Sun Mut. Ins. Co. v. Crist, 39 S. W. 837, 19 Ky. Law Rep. 305; Rochester Loan & Banking Co. v. Liberty Ins. Co., 44 Neb. 537, 62 N. W. 877, 48 Am. St. Rep. 745; Boyle v. Insurance Co., 109 Pa. 349, 32 Atl. 553.

¹³⁶ Davis v. Insurance Co., 157 N. Y. 685, 51 N. E. 1090.

¹³⁷ Partridge v. Insurance Co., 162 N. Y. 597, 57 N. E. 1119.

¹³⁸ Mauck v. Insurance Co. (Del. Super.) 54 Atl. 952.

Time within Which Proofs of Loss must be Given.

The periods within which proofs of loss must be given vary in different forms of policies. That specified in the standard policy is sixty days. "Sixty days after the fire" means, however, sixty days after the end of the fire, and not after its beginning.¹³⁹ The sixty-day period does not begin to run until the ruins are in such a condition as to permit an examination of the damaged goods.¹⁴⁰ By the weight of authority, the condition is satisfied if the proofs of loss are mailed within the specified period, even though they may not be received by the insurer until after the expiration of that period.¹⁴¹ The New York decisions, however, hold that the proofs must be received within the sixty days, it being contended that the word "render," used in the standard policy, necessarily implies a delivery.¹⁴² The former rule seems to be more in accordance with the analogies of the law and the general rules of construction applicable to insurance policies.

Effect of the Failure to Comply with These Conditions.

These conditions are reasonable and valid, and substantial compliance with them is undoubtedly a condition precedent to the maintenance of any action under the policy.¹⁴³ But a different question arises when we come to consider what is the effect of the failure to render proofs of loss within the period specified. On this point there is much conflict in the cases, which, however, is partly due to variations in the terms of the different policies that have been before the courts for construction. For purposes of clearness in examining the cases we may well divide them into four classes, in accordance with the different language used in the policies in describing the effect of a failure to comply strictly with these requirements.

(1) Many policies, especially the older forms, do not attempt to impose any penalty in case of failure to furnish proofs of loss as stipulated. In such cases it is manifest that the obligation to furnish the proofs of loss is but collateral to the main contract of insurance, so that a failure to perform that obligation will not in any wise affect the right

¹³⁹ National Wall Paper Co. v. Associated Mfrs.' Mut. Fire Ins. Corp., 175 N. Y. 226, 67 N. E. 440.

¹⁴⁰ *Id.*

¹⁴¹ Heusinkveld v. Insurance Co., 106 Iowa, 229, 76 N. W. 696; Pennypacker v. Insurance Co., 80 Iowa, 56, 45 N. W. 408, 8 L. R. A. 236, 20 Am. St. Rep. 395; Manufacturers' & Merchants' Mut. Ins. Co. v. Zeitinger, 168 Ill. 286, 48 N. E. 179, 61 Am. St. Rep. 105; Badger v. Insurance Co., 49 Wis. 389, 5 N. W. 848.

¹⁴² Peabody v. Satterlee, 166 N. Y. 174, 59 N. E. 818, 52 L. R. A. 956, reversing the lower court, which had held that mailing proofs of loss on the sixtieth day after the fire, when they were received the following day, was a sufficient compliance with this condition. See 36 App. Div. 426, 55 N. Y. Supp. 363.

¹⁴³ In some states these conditions are made invalid by statutory enactment. Maryland Casualty Co. v. Hudgins (Tex. Civ. App.) 72 S. W. 1047.

of the insured to enforce his claim against the insurer under the policy, although he in turn might be subjected to an action for breach of his collateral agreement.¹⁴⁴

(2) Other policies contain an express provision that a failure to comply with the condition requiring proofs of loss within a specified period shall render the policy void. There can be no question, in cases arising under such policies, that a failure to furnish the proofs within the period agreed absolutely defeats the rights of the insured under the policy.¹⁴⁵

(3) Some policies provide that no action shall be maintained on the policy unless all of the conditions of the policy have been complied with. Such a provision accomplishes practically the same result as the one last discussed, by absolutely taking away any right of action on the policy, and so, in effect, working a forfeiture of the policy.¹⁴⁶

Not a Condition Precedent under the Standard Policy.

(4) The standard policy provides that no action shall be sustainable on the policy "until after full compliance by the insured with all the foregoing requirements." In New York and some other states it is held that under this provision a failure to give the proofs of loss within sixty days, as specified, operates as a forfeiture of the policy.¹⁴⁷ By the great weight of authority, however, it is held that this condition operates merely to suspend the right of the insured to bring an action until sixty days shall have expired after the furnishing of the proofs of loss.¹⁴⁸ In accordance with this view, the specification of the time

¹⁴⁴ COLUMBIA INS. CO. v. LAWRENCE, 10 Pet. 507, 9 L. Ed. 512; Springfield Fire & Marine Ins. Co. v. Brown, 123 Pa. 392, 18 Atl. 396; Kenton Ins. Co. v. Downs, 90 Ky. 236, 13 S. W. 882.

¹⁴⁵ Gould v. Insurance Co., 90 Mich. 302, 51 N. W. 455; German Ins. Co. v. Davis, 40 Neb. 700, 59 N. W. 698.

¹⁴⁶ Gould v. Insurance Co., 90 Mich. 302, 51 N. W. 455; German Ins. Co. v. Davis, 40 Neb. 700, 59 N. W. 698.

¹⁴⁷ Quinlan v. Insurance Co., 133 N. Y. 356, 81 N. E. 31, 28 Am. St. Rep. 645; Blossom v. Insurance Co., 64 N. Y. 162; Cannon v. Insurance Co., 110 Ga. 563, 35 S. E. 775, 78 Am. St. Rep. 124.

¹⁴⁸ Kenton Ins. Co. v. Downs, 90 Ky. 236, 13 S. W. 882; Orient Ins. Co. v. Clark, 22 Ky. Law Rep. 1066, 59 S. W. 863; Northern Assur. Co. v. Hanna, 60 Neb. 29, 82 N. W. 97; Tubbs v. Insurance Co., 84 Mich. 646, 48 N. W. 296; Steele v. Insurance Co., 93 Mich. 81, 53 N. W. 514, 18 L. R. A. 85; Rheims v. Insurance Co., 39 W. Va. 672, 20 S. E. 670; Flatley v. Insurance Co., 95 Wis. 618, 70 N. W. 828; Welch v. Fire Ass'n (Wis. 1904) 98 N. W. 227; Niagara Fire Ins. Co. v. Scammon, 100 Ill. 644; Carpenter v. Insurance Co., 52 Hun, 249, 4 N. Y. Supp. 925; Weiss v. Insurance Co., 148 Pa. 349, 23 Atl. 991; Coventry Mut. Live Stock Ins. Ass'n v. Evans, 102 Pa. 281; Taber v. Insurance Co., 124 Ala. 681, 26 South. 252; Shell v. Insurance Co., 60 Mo. App. 644; Sun Mut. Ins. Co. v. Mattingly, 77 Tex. 162, 13 S. W. 1016; Continental Fire Ins. Co. v. Whitaker (Tenn. 1904) 79 S. W. 119; Indian River State Bank v. Hartford Fire Ins. Co. (Fla. 1904) 35 South. 223.

within which the proofs must be given is not of the essence of the contract, and the sole penalty for a failure to make the proofs within the sixty days is to postpone, for the time of the default, the right of action against the insurer. The limitation of the time in which an action can be brought to twelve months also operates under this rule as a final and absolute limit within which the proofs of loss must be given. No action can be brought until sixty days after the proofs are rendered, nor can it be brought later than twelve months after the fire. Consequently, in any event, the proofs of loss must be finally rendered within ten months after the fire. This is said to afford the insurer sufficient protection.¹⁴⁹

There is much to be said in favor of the New York rule, since it is undoubtedly to the interest of the insurer to have prompt information with regard to the subjects included within the required statement of loss, so that if need be, he may have an opportunity to gather evidence to contest the claim made. It is also probable that the New York standard policy, being drawn up with reference to the New York decisions, was intended by its draftsmen to require the proof of loss to be given within the sixty days as a condition precedent to any recovery on the policy. Nevertheless, since the rule of construction is so well settled that a forfeiture will never be implied or enforced unless unmistakably intended, it would seem that the construction given to this clause by the majority of the courts is more reasonable. This view appeals to the judicial mind the more strongly when it is observed that the policy expressly provides that a breach of certain other conditions shall avoid the policy, while it leaves forfeiture for a failure to give proofs of loss within the sixty days specified to a doubtful inference. Furthermore, the New York decisions do not show any evidence of a consideration of the reasons which have induced other courts to declare this condition merely suspensory, and not precedent; that is, that the forfeiture is not expressly declared, but implied.

When Noncompliance with These Conditions is Excused.

It seems now to be well settled, even in those states in which compliance with the conditions is required as a condition precedent to the right to recover under the policy, that a failure on the part of the insured to comply strictly with their terms will be excused when the circumstances were such as to make strict compliance impossible. Thus, where the insured becomes insane or otherwise incapable of attending to his business, and on that account proofs of loss are not given within the required time, the insurer will nevertheless be held liable.¹⁵⁰ So,

¹⁴⁹ Kenton Ins. Co. v. Downs, 90 Ky. 236, 13 S. W. 882.

¹⁵⁰ Woodmen Acc. Ass'n v. Pratt, 62 Neb. 673, 87 N. W. 546, 55 L. R. A. 291, 89 Am. St. Rep. 777; Hayes v. Casualty Co., 98 Mo. App. 410, 72 S. W. 135.

when the insured has died, and his personal representatives, at the time of the loss, had no knowledge of the existence of the policy, delay in furnishing proofs of loss beyond the required period is excused.¹⁵¹ In life insurance, a failure on the part of the beneficiaries to give notice of the death of the insured, as required by the policy, has been excused when the beneficiaries had no knowledge of the existence of the policy.¹⁵²

To Whom Notice and Proofs of Loss are to be Given.

The standard policy requires that notice and proofs of loss shall be given to the company. Manifestly, this can be done only by giving them to some agent of the company who is authorized to receive them. Whether, in any given case, the agent to whom the notice and proofs of loss may have been given was authorized to receive them on behalf of the company, is a matter of fact to be determined by a jury under proper instructions from the court.¹⁵³ Such authority may be given expressly or by implication. If it in fact exists, the company will be bound by the agent's receipt of the notice, irrespective of what may be written in the policy.¹⁵⁴ As a general thing, local agents are not authorized to act in this behalf for the company, but it may be shown in any particular case that the local agent was either actually or apparently vested with such authority.¹⁵⁵

By Whom Given.

The terms of the condition now under discussion require that the insured shall give the stipulated notice and proofs of loss, which shall be sworn to by him. These requirements manifestly will not be met by a statement and affidavit of any other person than the insured, provided it is possible for them to be given by him.¹⁵⁶ But it is generally held by the courts, in spite of the letter of the condition, that when it is impossible for the insured to comply with these requirements, whether because of his death or absence or incapacity, notice and verified proofs submitted on behalf of the insured by some reputable person interested

¹⁵¹ Fuller v. Insurance Co., 184 Mass. 12, 67 N. E. 879.

¹⁵² McElroy v. Insurance Co., 88 Md. 137, 41 Atl. 112, 71 Am. St. Rep. 400; Trippe v. Fund Soc., 140 N. Y. 23, 35 N. E. 316, 37 Am. St. Rep. 529. See, also, Kentzler v. Accident Ass'n, 88 Wis. 589, 60 N. W. 1002, 43 Am. St. Rep. 934.

¹⁵³ Burlington Ins. Co. v. Lowery, 61 Ark. 108, 32 S. W. 383, 54 Am. St. Rep. 196; Farmers' Mut. Ins. Co. v. Taylor, 73 Pa. 342.

¹⁵⁴ Travelers' Ins. Co. v. Edwards, 122 U. S. 457, 7 Sup. Ct. 1249, 30 L. Ed. 1178.

¹⁵⁵ ERMENTROUT v. INSURANCE CO., 63 Minn. 305, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St. Rep. 481; Harnden v. Insurance Co., 164 Mass. 382, 41 N. E. 658, 49 Am. St. Rep. 467.

¹⁵⁶ Graham v. Insurance Co., 77 N. Y. 171; Id., 12 Hun (N. Y.) 446; Ayres v. Insurance Co., 17 Iowa, 176, 85 Am. Dec. 553.

in the loss must be accepted by the insurer as a sufficient compliance with the requirements of the policy.¹⁵⁷ But no trivial excuse for the insured's failure to give personally the statement required, such as forgetfulness or indisposition, will suffice.¹⁵⁸ Compliance must be shown to have been impossible.¹⁵⁹

Insured Not Estopped by Proofs of Loss.

It is established beyond question that the insured is not estopped to show that statements made in the proofs of loss as rendered to the insurer are erroneous, if so on account of a bona fide mistake.¹⁶⁰ Such mistakes may always be explained. Thus, where the plaintiff stated in the proofs given the defendant that her husband, the insured, had died by suicide, she was allowed to show that her statement was based upon imperfect knowledge of the facts, and to introduce evidence that the insured came to his death by the accidental discharge of a gun.¹⁶¹ But an unexplained statement in the proofs of loss contradicting a representation made as a warranty in the application will be fatal to the plaintiff's case.¹⁶²

MAGISTRATE'S CERTIFICATE.

130. The requirement of the standard policy that the insured, when required, shall furnish the certificate of the nearest disinterested magistrate as to the facts concerning the loss, is, by the weight of authority, valid, but the tendency of all courts is to require only substantial, and not literal, compliance with its requirements. The statements of the certificate are not conclusive upon the insured.

¹⁵⁷ Thus, when the insured mortgagor will not give the required proofs of loss, it is the right and duty of the mortgagee, to whom the insurance is payable, to do so. Nor is he relieved of this duty by the terms of the standard mortgagee clause, exempting him from the consequences of the mortgagor's default. Southern Home Building & Loan Ass'n v. Home Ins. Co., 94 Ga. 167, 21 S. E. 375, 27 L. R. A. 844, 47 Am. St. Rep. 147.

¹⁵⁸ Fuller v. Insurance Co., 184 Mass. 12, 67 N. E. 879, in which it was held that the bankruptcy of the insured did not render performance of the condition impossible.

¹⁵⁹ Matthews v. Insurance Co., 154 N. Y. 449, 48 N. E. 751, 39 L. R. A. 433, 61 Am. St. Rep. 627; Bennett v. Insurance Co., 67 N. Y. 274; and see Semmes v. Insurance Co., 13 Wall. (U. S.) 158, 20 L. Ed. 490.

¹⁶⁰ Leman v. Insurance Co., 46 La. Ann. 1189, 15 South. 388, 24 L. R. A. 589, 49 Am. St. Rep. 348; Walther v. Insurance Co., 65 Cal. 417, 4 Pac. 413; Supreme Lodge Knights of Honor v. Jagers, 62 N. J. Law, 96, 40 Atl. 783.

¹⁶¹ Supreme Lodge K. P. v. Beck, 181 U. S. 49, 21 Sup. Ct. 532, 45 L. Ed. 741; Home Ben. Ass'n v. Sargent, 142 U. S. 691, 12 Sup. Ct. 332, 35 L. Ed. 1100.

¹⁶² Metropolitan Life Ins. Co. v. Rutherford, 98 Va. 195, 35 S. E. 361, 719. Here the application stated that the insured father died of cholera morbus, while in the proofs of loss fistula was said to be the cause of his death.

"* * * And shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify."

This provision, which enables the insurer to require a magistrate's certificate to the honesty and correctness of the insured's claim, is intended as another safeguard of the insurer against dishonest and fraudulent claims of loss. It need not be given unless required. When the insurer does elect to require the certificate, his election must be made clearly and unequivocally known to the insured,¹⁶³ and mere general notice to the insured that he will be required to comply strictly with the conditions in his policy has been held not to constitute sufficient notice that he will be required to furnish the magistrate's certificate.¹⁶⁴

The certificate must be furnished by a magistrate not interested in the claim as a creditor or related to the insured. It is held that this does not disqualify a magistrate who may have a mere contract claim against the insured. He must be a creditor in the sense of having some interest in the proceeds of the insurance.¹⁶⁵ It has also been held that a notary who had married the insured's first cousin was related to him within the terms of this condition.¹⁶⁶ The courts are, however, not inclined to be very nice in measuring distances, when it is claimed that the certificate is not by the nearest magistrate. If the certificate has been secured in good faith, the mere fact that the magistrate giving it is found to have lived a little farther from the property destroyed than another will not render the certificate insufficient.¹⁶⁷

This requirement of the policy is generally held to be valid and binding, and the certificate, when required to be furnished within a reasonable time, is a condition precedent to the right of action.¹⁶⁸ Some

¹⁶³ If the insured obtains a magistrate's certificate, without being requested to do so, he thereby obviates the necessity of the insurer's request. He will then be subject to all the requirements necessary to an effective certificate, just as if it had been requested. *Aetna Ins. Co. v. People's Bank*, 62 Fed. 222, 10 C. C. A. 342, 8 U. S. App. 554. See, also, *Moyer v. Insurance Office*, 176 Pa. 579, 35 Atl. 221, 53 Am. St. Rep. 690.

¹⁶⁴ *Moyer v. Insurance Office*, 176 Pa. 579, 35 Atl. 221, 53 Am. St. Rep. 690.

¹⁶⁵ *DOLLIVER v. INSURANCE CO.*, 131 Mass. 39. See, also, *SMITH v. INSURANCE CO.*, 47 Hun (N. Y.) 30.

¹⁶⁶ *Aetna Ins. Co. v. People's Bank*, 62 Fed. 222, 10 C. C. A. 342, 8 U. S. App. 554.

¹⁶⁷ *Williams v. Insurance Co. (C. C.)* 39 Fed. 167; *SMITH v. INSURANCE CO.*, 47 Hun (N. Y.) 41; *McNally v. Insurance Co.*, 137 N. Y. 389, 33 N. E. 475.

¹⁶⁸ *SMITH v. HOME INS. CO.*, 47 Hun (N. Y.) 30; *Johnson v. Insurance Co.*, 112 Mass. 49, 17 Am. St. Rep. 65; *DOLLIVER v. INSURANCE CO.*, 131 Mass. 39; *Lane v. Insurance Co.*, 50 Minn. 227, 52 N. W. 649, 17 L. R. A. 197;

courts, however, hold that a substantial compliance with the condition is all that can be required, and that, if the nearest magistrate will not give the certificate, it may be secured from the one who is next nearest.¹⁶⁹ In one state, at least, the whole condition is held to be void as repugnant to the purposes of the contract. This view is taken on the ground that the condition subjects the insured's right under his contract to the caprice of a third party, over whom he has no control.¹⁷⁰

Like the statements made in the proofs of loss, those set forth in the magistrate's certificate are not conclusive upon the insured. He may subsequently show that statements certified to by the magistrate, whether as to the value of the goods damaged or the circumstances of the loss, were mistaken.¹⁷¹

LIMITATION UPON ACTIONS.

191. The standard policy provides that no action shall be brought on the policy unless commenced within twelve months next after the fire. This condition is valid, and, unless waived by the insurer, absolutely bars any action or suit on the policy after the expiration of the time specified.

In those states in which standard forms of policies have been prescribed by statute, the provision contained therein limiting the time within

Edgerly v. Insurance Co., 48 Iowa, 644; *COLUMBIA INS. CO. v. LAWRENCE*, 10 Pet. 507, 9 L. Ed. 512; *Gilligan v. Insurance Co.*, 20 Hun (N. Y.) 95, affirming 87 N. Y. 626.

¹⁶⁹ *Noone v. Insurance Co.*, 88 Cal. 152, 26 Pac. 103. Here it was held that the certificate of the next nearest magistrate was sufficient, if the nearest magistrate refused to issue one because he was employed by the insurance company requiring the certificate. But in California a statute has been passed making the next nearest magistrate's certificate sufficient if for any good reason the nearest magistrate refuses to issue one.

¹⁷⁰ *German-American Ins. Co. v. Norris*, 100 Ky. 29, 37 S. W. 267, 66 Am. St. Rep. 324. The insurer "insists very earnestly that the failure to furnish the certificate of the magistrate when required is a bar to" the insured's "right to recover, but we do not think that the policy, when fairly read and construed, constitutes such failure a bar to recovery. It could not be used as evidence against the insured, and, as there is no law by which the insured could compel a magistrate to act in the matter, it is not reasonable that parties would undertake to procure the certificate of an officer when there was no law by which he could be required to certify at all."

¹⁷¹ *Birmingham Fire Ins. Co. v. Pulver*, 126 Ill. 329, 18 N. E. 804, 9 Am. St. Rep. 598; *Lebanon Ins. Co. v. Kepler*, 106 Pa. 28; *Miaghan v. Insurance Co.*, 24 Hun (N. Y.) 58; *Hoffman v. Insurance Co.*, 1 Rob. (N. Y.) 501; *Id.*, 32 N. Y. 405, 88 Am. Dec. 337; *Parmelee v. Insurance Co.*, 54 N. Y. 193; *McMaster v. Insurance Co.*, 55 N. Y. 222, 14 Am. Rep. 239; *Commercial Ins. Co. v. Huckerger*, 52 Ill. 464.

In *Farrell v. Insurance Co.*, 7 Bart. (Tenn.) 542, it was held the statement in the magistrate's certificate as to the value of the property lost is not conclusive against the insurers.

which an action may be brought to enforce rights claimed under such policies, is in effect a special statute of limitations upon actions against insurance companies. As such it has the same standing as any other statute of limitations, and is necessarily valid.¹⁷² But even in those states in which the standard form of policy has not the sanction of statute this condition is, almost without dissent, held to be valid and binding, provided the circumstances are not such as to make it unreasonable;¹⁷³ as where, for instance, the terms of an accident policy, taken in connection with the facts of the case, made it absolutely impossible that any action could have been brought within the specified twelve months after the accident.¹⁷⁴ Likewise, it was held by the Supreme Court that the intervention of war rendered this condition absolutely inoperative, not merely suspending it, as in the case of a proper statute of limitations.¹⁷⁵ But with the exception of such unusual cases the courts have enforced the right of the insurer to place this limit upon actions upon the policy, even where it worked hardship. Thus, it is held that the fact that the insured is an infant does not relieve him of the obligation to bring his suit within the twelve months stipulated, and a suit brought by him after reaching majority is held to be barred.¹⁷⁶ So, the mere fact of instituting, within the twelve months, a suit which was dismissed, did not prevent a subsequent suit, instituted after the expiration of the year, from being too late, even though the statute of the state expressly provided that the regular statute of limitations should begin to run only after the dismissal of such a suit.¹⁷⁷

In one state at least—Nebraska—this condition is held to be absolutely void, as contrary to public policy.¹⁷⁸ Early cases in other jurisdictions show a disposition on the part of the courts to disregard the condition,¹⁷⁹ but, with the exception above noted, it is believed that its validity is practically unquestioned in all of the American states.¹⁸⁰

¹⁷² *Hamilton v. Insurance Co.*, 156 N. Y. 327, 50 N. E. 863, 42 L. R. A. 485. To the same effect, see *Titus v. Poole*, 145 N. Y. 414, 40 N. E. 228; *Hayden v. Pierce*, 144 N. Y. 512, 39 N. E. 638.

¹⁷³ *Friezen v. Insurance Co. (C. C.)* 30 Fed. 352; *Fullam v. Insurance Co.*, 7 Gray (Mass.) 61, 66 Am. Dec. 462.

¹⁷⁴ *Denison v. Accident Ass'n*, 59 App. Div. 294, 69 N. Y. Supp. 291.

¹⁷⁵ *Semmes v. Insurance Co.*, 13 Wall. 158, 20 L. Ed. 490.

¹⁷⁶ *Mead v. Insurance Co. (Kan.)* 75 Pac. 475, 64 L. R. A. 79.

¹⁷⁷ *RIDDLESBARGER v. INSURANCE CO.*, 7 Wall. (U. S.) 386, 19 L. Ed. 257. See, also, *Ward v. Insurance Co. (Miss.)* 33 South. 841; *Howard Ins. Co. v. Hocking*, 130 Pa. 170, 18 Atl. 614.

¹⁷⁸ *Miller v. Insurance Co.*, 54 Neb. 121, 74 N. W. 416, 69 Am. St. Rep. 709; *Omaha Fire Ins. Co. v. Drennan*, 56 Neb. 623, 77 N. W. 67.

¹⁷⁹ *Westchester Fire Ins. Co. v. Dodge*, 44 Mich. 420, 6 N. W. 865; *Long v. Hope Ins. Co. (La.)* 17 Ins. Law J. 638; *Stout v. Insurance Co.*, 12 Iowa, 371, 79 Am. Dec. 539.

¹⁸⁰ *RIDDLESBARGER v. INSURANCE CO.*, 7 Wall. 386, 19 L. Ed. 257; *Provident Fund Soc. v. Howell*, 110 Ala. 508, 18 South. 311; *Universal Mut.*

When the Period Begins to Run.

Some of the older forms of policies provided that no action shall be brought within twelve months "after loss." In considering the condition so worded, probably a majority of the courts came to hold that the specified period did not begin to run until a right of action accrued under the terms of the policy, the word "loss" being construed as "liability."¹⁸¹ The standard policy substitutes the expression "next after the fire." This would seem so clearly to indicate the intention that the period of limitation should begin to run immediately upon the happening of the fire, irrespective of the time when the right of action accrues, that one is surprised to find it held otherwise in some jurisdictions.¹⁸² It is believed, however, that by the overwhelming weight of authority an action commenced later than twelve months after the occurrence of the fire will be barred.¹⁸³

Fire Ins. Co. v. Weiss, 106 Pa. 20; *Farmers' Mut. Fire Ins. Co. v. Barr*, 94 Pa. 345; *Spare v. Insurance Co. (C. C.)* 17 Fed. 568; *Chandler v. Insurance Co.*, 21 Minn. 85, 18 Am. Rep. 385; *Mix v. Insurance Co.*, 9 Hun (N. Y.) 399; *Wilkinson v. Insurance Co.*, 72 N. Y. 499, 28 Am. Rep. 166; *Moore v. Insurance Co.*, 72 Iowa, 414, 34 N. W. 183; *Vette v. Insurance Co. (C. C.)* 30 Fed. 668; *Spare v. Insurance Co. (C. C.)* 17 Fed. 568; *Thompson v. Insurance Co. (C. C.)* 25 Fed. 296; *Virginia Fire & Marine Ins. Co. v. Wells*, 83 Va. 736, 3 S. E. 349; *Same v. Aiken*, 82 Va. 424; *Tasker v. Insurance Co.*, 58 N. H. 469; *Chambers v. Insurance Co.*, 51 Conn. 17, 50 Am. Rep. 1; *McElroy v. Insurance Co.*, 48 Kan. 200, 29 Pac. 478; *Killips v. Insurance Co.*, 28 Wis. 472, 9 Am. Rep. 506.

¹⁸¹ *Steel v. Insurance Co.*, 154 U. S. 518, 14 Sup. Ct. 1153, 38 L. Ed. 1064, affirming, by a divided court, same case, 7 U. S. App. 325, 51 Fed. 715, 2 C. C. A. 463; *Hay v. Insurance Co.*, 77 N. Y. 235, 244, 33 Am. Rep. 607; *City of New York v. Hamilton Fire Ins. Co.*, 39 N. Y. 45, 100 Am. Dec. 400; *Chandler v. Insurance Co.*, 21 Minn. 85, 18 Am. Rep. 385; *Vette v. Insurance Co. (C. C.)* 30 Fed. 668; *Barber v. Insurance Co.*, 16 W. Va. 658, 37 Am. Rep. 800; *Murdock v. Insurance Co.*, 33 W. Va. 407, 10 S. E. 777, 7 L. R. A. 572; *Owen v. Insurance Co.*, 87 Ky. 574, 10 S. W. 119; *Spare v. Insurance Co. (C. C.)* 17 Fed. 568; *German Ins. Co. v. Fairbank*, 32 Neb. 750, 49 N. W. 711, 29 Am. St. Rep. 459; *Ellis v. Insurance Co.*, 64 Iowa, 507, 20 N. W. 782; *Miller v. Insurance Co.*, 70 Iowa, 704, 29 N. W. 411; *Steen v. Insurance Co.*, 89 N. Y. 315, 42 Am. Rep. 297.

¹⁸² *Friezen v. Insurance Co. (C. C.)* 30 Fed. 352; *Firemen's Fund Ins. Co. v. Buckstaff*, 38 Neb. 150, 56 N. W. 697, 41 Am. St. Rep. 727; *German Ins. Co. of Freeport v. Davis*, 40 Neb. 700, 59 N. W. 698; *Hong Sling v. Insurance Co.*, 8 Utah, 135, 30 Pac. 307; *Case v. Insurance Co.*, 83 Cal. 473, 23 Pac. 534, 8 L. R. A. 48; *Read v. Insurance Co.*, 103 Iowa, 307, 72 N. W. 665, 64 Am. St. Rep. 180; *Hocking v. Insurance Co.*, 130 Pa. 170, 18 Atl. 614. Here it was said that the equitable construction of the clause "twelve months next after the fire shall have occurred" is twelve months after a right of action shall have accrued.

¹⁸³ *HART v. INSURANCE CO.*, 86 Wis. 81, 56 N. W. 333, 21 L. R. A. 745, 39 Am. St. Rep. 880; *Thompson v. Insurance Co. (C. C.)* 25 Fed. 296; *Owen v. Insurance Co.*, 87 Ky. 571, 10 S. W. 119, in which the insured was allowed to bring his suit on Monday because the last day allowed him in the policy

Condition may be Waived.

Like any other condition of the policy, this limitation upon the right to bring an action may be waived by the insurer. Any conduct on his part by which he knowingly induced the insured to postpone bringing action, in the hope of a promised settlement, will estop the insurer to claim the benefit of the condition.¹⁸⁴

fell on Sunday. *McElhone v. Benefit Ass'n*, 2 App. D. C. 397, 22 Wash. Law Rep. 157; *King v. Insurance Co.*, 47 Hun (N. Y.) 1; *State Ins. Co. v. Meesman*, 2 Wash. St. 459, 27 Pac. 77, 26 Am. St. Rep. 870; *Virginia Fire & Marine Ins. Co. v. Wells*, 83 Va. 736, 3 S. E. 349; *McElroy v. Insurance Co.*, 48 Kan. 200, 29 Pac. 478; *State Ins. Co. v. Stoffels*, 48 Kan. 205, 29 Pac. 479; *Hart v. Insurance Co.*, 86 Wis. 77, 56 N. W. 332, 21 L. R. A. 743, 39 Am. St. Rep. 877.

¹⁸⁴ *MICKEY v. INSURANCE CO.*, 35 Iowa, 174, 14 Am. Rep. 494.

"It would be contrary to justice for the insurance company to hold out the hope of an amicable adjustment of the loss, and thus delay the action of the insured, and then be permitted to plead this very delay, caused by its course of conduct, as a defense to the action when brought." *Thompson v. Insurance Co.*, 136 U. S. 287, 10 Sup. Ct. 1019, 34 L. Ed. 408; *Killips v. Insurance Co.*, 28 Wis. 472, 9 Am. Rep. 506; *Martin v. Insurance Co.*, 44 N. J. Law, 485, 43 Am. Rep. 397; *Allemania Fire Ins. Co. v. Peck*, 133 Ill. 220, 24 N. E. 538, 23 Am. St. Rep. 610; *Firemen's Fund Ins. Co. v. Western Refrigerating Co.*, 162 Ill. 322, 44 N. E. 746; *Illinois Live Stock Ins. Co. v. Baker*, 153 Ill. 240, 38 N. E. 627; *HOME INS. & BANKING CO. v. MYER*, 93 Ill. 271; *Bonnert v. Insurance Co.*, 129 Pa. 558, 18 Atl. 552, 15 Am. St. Rep. 739; *Hand v. Insurance Co.*, 57 Minn. 519, 59 N. W. 538; *Grant v. Insurance Co.*, 5 Ind. 23, 61 Am. Dec. 74; *Phenix Ins. Co. v. Rad Bila Hora Lodge*, 41 Neb. 21, 59 N. W. 752; *Dwelling House Ins. Co. v. Brodie*, 52 Ark. 11, 11 S. W. 1016, 4 L. R. A. 458; *Horst v. Insurance Co.*, 73 Tex. 67, 11 S. W. 148; *Black v. Insurance Co.*, 31 Wis. 74; *Eggleston v. Insurance Co.*, 65 Iowa, 308, 21 N. W. 652; *Bish v. Insurance Co.*, 69 Iowa, 184, 28 N. W. 553.

CHAPTER XIV.

TERMS OF THE LIFE POLICY.

- 192. In General.
- 193. Designation of Beneficiary.
- 194. Statement of Age.
- 195-196. Suicide—When not Excepted in the Policy.
- 197-199. Suicide—When Excepted in the Policy.
- 200-201. Death in Violation of Law.
- 202-204. Assignment.
- 205. Incontestable Clause.

IN GENERAL.

192. There is no standard or generally accepted form of life policy.

The terms of life insurance policies differ so greatly that no effort has ever been made to prepare a standard form to be used by all insurers, as was seen to be the case in fire insurance. Nor has practice developed a uniform instrument, as in the case of the Lloyd policy in general use among marine insurers. The very nature of the business of life insurance necessitates this great variation among the forms of policies used. The purposes for which life insurance is procured are many and various, and policies prepared by the insurers for carrying into effect the desires of persons seeking insurance must necessarily vary accordingly. The older forms of life policies were very verbose and perplexing documents, filled with numerous conditions, printed in fine type, that the insured found much difficulty in reading, and more difficulty in understanding when read. The tendency at the present day, however, among insurance companies of the best standing, is to simplify the policy as much as possible, inserting only such conditions as are imperatively necessary to the safe conduct of the business. But even in these simpler forms are to be found many terms and conditions setting forth various elective benefits to the insured or to the beneficiaries after the maturity of the policy. These terms are often difficult of construction, but they vary so greatly in the numerous kinds of insurance issued that it will be impracticable to attempt any discussion of the cases construing them, and no safe rule could be laid down that would have any general application.

Again, in considering the construction of life insurance policies, it must be remembered that all contracts made by mutual associations embrace as constituent parts thereof the provisions of the charters and by-laws of these associations. These vary almost infinitely, so that any general discussion of their construction, if confined to the limited space

permissible in such a treatise as this, would be of little value. Therefore, disregarding the many varying special conditions and terms that may be found in life policies, we shall content ourselves with a discussion of those rules of construction which have been laid down by the courts in determining the scope and effect of the few primary conditions of life insurance contracts to be found in practically all policies.

The scope of such a discussion is much narrowed by the fact that many of the general principles of insurance law already treated of find ready application in determining rights under life policies, and also because many of the principles of construction laid down in the preceding chapters as applying to fire policies have equal application to life policies, such as, for instance, the requirement of proofs of loss, or the condition as to the authority of agents of the insurer to affect rights acquired under the policy.¹

DESIGNATION OF BENEFICIARY.

193. Words used in designating the beneficiaries of a life policy will not be given their technical significance, but will be construed broadly, in order that the benefit of the insurance shall be received by those intended by the insured as the objects of his bounty.

In a former chapter we found it necessary to consider to some extent the construction of words used in designating beneficiaries under the life policy.² It is now advisable to consider with more detail the rules which guide the courts in determining who are entitled to take the benefit of insurance under the expressions used in policies designating beneficiaries.

First, we must observe that, in interpreting the words used by the insured to indicate the person whom he desires to be the object of his bounty, it is necessary for the court not only to consider the whole purpose of the contract as appearing from all of its terms, and from the regulations of mutual associations when the insurance is granted by such bodies, but also to consider all the circumstances surrounding the parties at the time of making the contract. In many respects the designation of persons who are to take an insurance fund at the death of the insured is similar to that of devisees or legatees under a will, and the same rule of construction should be applied.³ It should be the one

¹ That the rule that all doubts as to the meaning of a policy are to be resolved in favor of the insured applies with especial force to life policies after the death of the insured. See *Mutual Benefit Life Ins. Co. v. First Nat. Bank*, 69 S. W. 1, 24 Ky. Law Rep. 580.

² Ante, p. 388.

³ *Duvall v. Goodson*, 79 Ky. 224; *Russ v. Supreme Council*, 110 La. 588, 34 South. 697.

aim of the courts to carry out the intention of the insured so far as may be possible within the bounds of the language used. An ordinary person attempting to designate the objects of his bounty, whether in a will or insurance policy, is not thoroughly skilled in the law or acquainted with the technical meaning of legal terms. Hence we derive a general rule that the words used in designating a beneficiary will not be construed in their technical significance, but in accordance with the sense in which they were used.⁴ Thus the words "heirs" or "legal heirs" will not ordinarily be construed as indicating merely the heirs at law, but rather that class of persons who would take the personalty of the insured in case he died intestate.⁵ Therefore it is generally held that the widow of the deceased is entitled to take under a policy payable to his "heirs" or "legal heirs," as well as the children of the deceased.⁶ If, however, the terms of the policy, read as a whole, show an intention to use the term "heirs" in its technical sense, the children alone will take under such a policy, to the exclusion of the widow.⁷ So, by the better

⁴ *Walter v. Hensel*, 42 Minn. 204, 44 N. W. 57. In *Pace v. Pace*, 19 Fla. 438, the words "for the benefit of the estate of the insured," by the aid of extrinsic evidence, were construed to mean that the policy was for the benefit of a minor child of the insured, and not payable to his administrator. See, also, *Loos v. Insurance Co.*, 41 Mo. 538.

⁵ *Lamont v. Grand Lodge (C. C.)* 31 Fed. 177; *Hubbard, Price & Co. v. Turner*, 93 Ga. 752, 20 S. E. 640, 30 L. R. A. 593; *Tompkins v. Levy*, 87 Ala. 263, 6 South. 346, 13 Am. St. Rep. 42; *Janda v. Union*, 71 App. Div. 150, 75 N. Y. Supp. 654; *Johnson v. Knights of Honor*, 53 Ark. 255, 13 S. W. 794, 8 L. R. A. 732; *Britton v. Supreme Council of Royal Arcanum*, 46 N. J. Eq. 102, 18 Atl. 675, 19 Am. St. Rep. 376, in which the insured's mother, who was dependent upon him, was held entitled to the fund, the insured having left neither wife nor child. *Mullen v. Reed*, 64 Conn. 240, 29 Atl. 478, 24 L. R. A. 664, 42 Am. St. Rep. 174; *Bishop v. Grand Lodge*, 112 N. Y. 627, 20 N. E. 562; *Hubbard, Price & Co. v. Turner*, 93 Ga. 752, 20 S. E. 640, 30 L. R. A. 593. In this case the brother of the assured was said to be the beneficiary if the assured died leaving no wife or child, "heir" being construed as meaning his next of kin according to the statute of distribution. See, also, *Northwestern Masonic Aid Ass'n v. Jones*, 154 Pa. 99, 26 Atl. 253, 35 Am. St. Rep. 810; *Walsh v. Walsh*, 66 Hun (N. Y.) 297, 20 N. Y. Supp. 933; *Gauch v. Insurance Co.*, 88 Ill. 251, 30 Am. Rep. 554.

⁶ *Lyons v. Yerex*, 100 Mich. 214, 58 N. W. 1112, 43 Am. St. Rep. 452; *Shultz v. Insurance Co.*, 59 Minn. 308, 61 N. W. 331; *Wilburn v. Wilburn*, 83 Ind. 55. In this case the third wife of the insured was given one-twelfth of the amount of the insurance, the other eleven-twelfths being divided among the eleven children of the insured. The court reached this conclusion in construing the phrase "legal heirs." See, also, *Leavitt v. Dunn*, 56 N. J. Law, 309, 28 Atl. 590, 44 Am. St. Rep. 402. In *Walsh v. Walsh*, 66 Hun (N. Y.) 297, 20 N. Y. Supp. 933, the insured's wife was allowed to take a share of the policy with the brothers and sisters of the insured, as heirs. *Hanson v. Association*, 59 Minn. 123, 60 N. W. 1091; *Lawwill v. Lawwill*, 29 Ill. App. 643; *Alexander v. Association*, 126 Ill. 558, 18 N. E. 556, 2 L. R. A. 161; *Young Men's Mut. Life Ass'n v. Pollard*, 3 Ohio Cir. Ct. R. 577.

⁷ *Phillips v. Carpenter*, 79 Iowa, 600, 44 N. W. 898; *Johnson v. Knights of VANCE INS.—33*

authority, a policy payable to the "legal representatives" of the insured is payable, not to his personal representatives, but to such as would be his distributees in case of intestacy.⁸ But here, also, other terms of the contract may show that the phrase was intended to be used in the sense of "personal representatives," in which case the fund becomes payable to the estate of the insured, and is subject to his debts.⁹

Insurance for Benefit of Children.

Much litigation has arisen in determining what persons are entitled to take an insurance fund made payable to the "children" of the insured. Ordinarily the term includes only the descendants of the insured in the first generation,¹⁰ not grandchildren, but in several cases grandchildren have been allowed to take under such designations when it was reasonable to infer, from a reading of the whole contract, that such was the intention of the insured.¹¹ So children born after the issue of the policy are allowed to take equally with those then in existence.¹² An adopted child is likewise included among the beneficiaries so designated,¹³ but not an illegitimate child, though recognized as such.¹⁴ Insurance made payable to "my wife and children" is for the benefit of all

Honor, 53 Ark. 255, 13 S. W. 794, 8 L. R. A. 732; Mearns v. Ancient Order, 22 Ont. 34; Gauch v. Insurance Co., 88 Ill. 251, 30 Am. Rep. 554.

⁸ Rose v. Wortham, 95 Tenn. 505, 32 S. W. 458, 30 L. R. A. 609; Schultz v. Insurance Co., 59 Minn. 308, 61 N. W. 331; Murray v. Strang, 28 Ill. App. 608; Mutual Life Ins. Co. v. Armstrong, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997; Hodge's Appeal (Pa.) 9 Ins. Law J. 709; Griswold v. Sawyer, 125 N. Y. 411, 26 N. E. 464.

⁹ People v. Phelps, 78 Ill. 147; Sulz v. Association, 145 N. Y. 563, 40 N. E. 242, 28 L. R. A. 379.

¹⁰ Small v. Jose, 86 Me. 120, 29 Atl. 976; Continental Life Ins. Co. v. Webb, 54 Ala. 688; Russell v. Russell, 64 Ala. 500; United States Trust Co. v. Mutual Benefit Life Ins. Co., 115 N. Y. 152, 21 N. E. 1025; Martin v. Insurance Co., 73 Me. 25; Winsor v. Association, 13 R. I. 149.

¹¹ Duvall v. Goodson, 79 Ky. 224. In Continental Life Ins. Co. v. Palmer, 42 Conn. 60, 19 Am. Rep. 530, the court said that as soon as a policy was issued it became property, the title of which vested in the beneficiaries, and on the death of one of the beneficiaries his interest passed to his heirs. In this case his heirs were his children, they being the grandchildren of the insured.

¹² Scull v. Insurance Co., 132 N. C. 30, 43 S. E. 504, 60 L. R. A. 615, 95 Am. St. Rep. 615; Roquemore v. Dent, 135 Ala. 292, 33 South. 178, 93 Am. St. Rep. 33; Thomas v. Leake, 67 Tex. 471, 3 S. W. 703; Ricker v. Insurance Co., 27 Minn. 193, 6 N. W. 771, 38 Am. Rep. 289. See, also, Virgin v. Marwick, 97 Me. 578, 55 Atl. 520. But see Connecticut Mut. Life Ins. Co. v. Baldwin, 15 R. I. 106, 23 Atl. 105, in which the court said that at the time the policy was issued it vested a right in the insured's wife and children then in being.

¹³ Virgin v. Marwick, 97 Me. 578, 55 Atl. 520; Martin v. Insurance Co., 73 Me. 25.

¹⁴ But it was held in Hanley v. Supreme Tent, 38 Misc. Rep. 161, 77 N. Y. Supp. 246, that illegitimate children described as "adopted children" would be allowed to take the fund.

children of the insured, whether by the named wife or those of another;¹⁵ but if the term "our children" is used, the insurance passes only to the issue of the insured by the wife named in the policy.¹⁶

Insurance Payable to Insured's "Wife."

When the regulations of the mutual association allow insurance for the benefit of the wife, this does not permit insurance for the benefit of a woman with whom the insured is living as a wife;¹⁷ but it has been held that where an insurance company paid a sum due under a benefit certificate, by its terms payable to a certain woman designated therein as wife of the insured, proof that the woman receiving the money was not really the wife of the insured did not render the insurer liable to pay the sum a second time to the real wife of the insured.¹⁸ So, when the by-laws of a mutual association allowed certificates to issue for the benefit of various specified persons and "their dependents," it has been held that insurance made payable to the "affianced wife" of the insured could be collected by her if she was in fact dependent upon the insurance,¹⁹ but otherwise not.²⁰

Insurance Payable to the Family of the Insured.

The rather vague term "family" is frequently used in benefit certificates to indicate the recipient of the fund. In deciding whether a particular person claiming a share of the fund is of the family of the insured, the court will consider whether that person was so regarded by the insured. If he was so regarded, he will be allowed to participate, although in no way related to the insured. Thus, where a young lady had lived for many years in the same house with an old man, who supported her as would a father, it was held that she was a part of his family.²¹ So a widowed mother, or other dependent relatives residing with the insured, are within the meaning of this term.²² Public policy forbids, however, that the funds should become payable to the mistress

¹⁵ Ricker v. Insurance Co., 27 Minn. 193, 6 N. W. 771, 38 Am. Rep. 289; Stigler's Ex'x v. Stigler, 77 Va. 163.

¹⁶ Evans v. Opperman, 76 Tex. 293, 13 S. W. 312.

¹⁷ Keener v. Grand Lodge, 38 Mo. App. 543. One who marries a man, ignorant of the fact that he has a wife living, is entitled to the amount due upon a life benefit certificate made payable to her by the deceased, as against the lawful wife. Crosby v. Ball, 4 Ont. Law Rep. 496. And the mother of illegitimate children may be made beneficiary where the father contracts to support them. Brown v. Mansur, 64 N. H. 39, 5 Atl. 768.

¹⁸ Kulp v. Brant, 162 Pa. 222, 29 Atl. 729.

¹⁹ McCarthy v. Supreme Lodge, 153 Mass. 314, 26 N. E. 868, 11 L. R. A. 144, 25 Am. St. Rep. 637.

²⁰ Palmer v. Welch, 132 Ill. 141, 23 N. E. 412. See, also, Supreme Council v. Perry, 140 Mass. 580, 5 N. E. 634.

²¹ Carmichael v. Association, 51 Mich. 494, 16 N. W. 871.

²² See Folmer's Appeal, 87 Pa. 133; Carmichael v. Association, 51 Mich. 494, 16 N. W. 871.

of the insured, even though he may have maintained a family and have lived with her.²³

These illustrations will serve sufficiently to indicate in what manner the courts apply the general rule above stated. There are numerous cases presenting other phrases for construction, but as a general rule each case stands upon its own footing, and the construction to be placed upon the words used is governed by all the terms of the contract, considered as a whole.

STATEMENT OF AGE.

- 194. A misstatement of the age of the insured is a material misrepresentation, which, in the absence of a provision in the policy to the contrary, will avoid the insurance. Modern life policies usually contain a provision saving the policy from forfeiture in case of such a mistake.**

Modern insurance policies ordinarily contain a term of this kind: "In case the age of the insured shall have been misstated, the amount payable hereunder shall be that sum which the premium paid would have provided for had the age been stated correctly in the application." This is an eminently just and reasonable provision. Without it the least mistake made by the insured in stating his age, whether due to inadvertence or forgetfulness, would absolutely avoid the policy, even though there was no intention on the part of the insured to defraud the company.²⁴ A person's age is a fact material to the risk, so that, under the familiar doctrine that an innocent material misrepresentation avoids the insurance contract, the insured might be deprived of the protection of his policy under circumstances of peculiar hardship.

SUICIDE—WHEN NOT EXCEPTED IN THE POLICY.

- 195. By the weight of authority, suicide is not by implication excepted from the risks assumed by the insurer, unless the policy was taken out with an intention to commit suicide and thus defraud the insurer. This rule applies especially to insurances for the benefit of another than the insured.**
- 196. In the federal courts, and in the courts of several states, suicide of the insured is held to avoid the policy, on the double ground of an implied exception to the risk, and of public policy prohibiting insurance against suicide.**

When the Insured is Sane.

It seems to be now settled by the clear weight of authority in this country that the self-destruction of the insured, whether it be deliber-

²³ Keener v. Grand Lodge, 38 Mo. App. 544.

²⁴ AETNA LIFE INS. CO. v. FRANCE, 91 U. S. 510, 23 L. Ed. 401; Dolan v. Association, 173 Mass. 197, 53 N. E. 398.

ately done while sane, or irresponsibly inflicted while insane, is one of the risks assumed by the insurer, unless it is by express terms excepted.²⁵ A different view, however, was taken by the Supreme Court in the recent important case of Ritter v. Mutual Life Ins. Co.²⁶ In this case one Runk, already heavily insured, became a defaulter to a large amount. Subsequently to such default he procured additional insurance to a large amount, so that the aggregate sum of his policies at the time of his death amounted to \$500,000. There was clear evidence that Runk took his own life while perfectly sane, with the intention of maturing his policies in order to make good his default. By reason of a failure of the insurance company to comply with the law of Pennsylvania requiring copies of the application to be attached to the policies, the conditions therein against suicide were not allowed to be shown in evidence. Under these facts there was squarely presented to the Supreme Court the question whether an insurance company is liable for the death of the insured by suicide when the policy contains no provision with reference to self-destruction. The court, in a powerful opinion by Mr. Justice Harlan, affirmed the decision of the lower court, holding the insurer not liable. This decision was based upon two grounds: (1) That there is implied in every contract of life insurance a condition that the insured shall not voluntarily and intentionally increase the risk assumed by the insurer; therefore the intentional self-destruction of the insured, while sane, amounts to a violation of this implied condition, in accordance with the same principle that holds a fire policy to be avoided when the insured property is destroyed by the intentional act of the person insured. (2) That an agreement to insure a person against his wrongful act of self-destruction, even though expressly set forth, would be contrary to public policy, and therefore void. The New York Court of Appeals, in a recent decision,²⁷ thus states the first ground upon which the Ritter Case is based: "It is an inherent and fundamental part of every such contract that the insured shall not intentionally take his own life. No act so contrary to good morals and

²⁵ PATTERSON v. INSURANCE CO., 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. Rep. 899; Supreme Conclave Improved Order of Heptasophs v. Miles, 92 Md. 613, 43 Atl. 845, 84 Am. St. Rep. 528; Eastabrook v. Insurance Co., 54 Me. 224, 89 Am. Dec. 743; Grand Lodge Independent Order of Mutual Aid v. Wieting, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123; Kerr v. Association, 39 Minn. 174, 39 N. W. 312, 12 Am. St. Rep. 631; Schultz v. Insurance Co., 40 Ohio St. 217, 48 Am. Rep. 676; John Hancock Mut. Life Ins. Co. v. Moore, 34 Mich. 46; Connecticut Mut. Life Ins. Co. v. Groom, 86 Pa. 92, 27 Am. Rep. 639; Darrow v. Society, 116 N. Y. 537, 22 N. E. 1093, 6 L. R. A. 495, 15 Am. St. Rep. 430.

²⁶ RITTER v. MUTUAL LIFE INS. CO., 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693.

²⁷ Shipman v. Protected Home Circle, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347.

the usual course of human nature should be held to be within the contemplation of the parties to a contract for life insurance, unless it is clearly and unequivocally expressed."

There is much in the reasoning of the court in the Ritter Case to commend the rule there adopted, which is established in the English and in a few of the American courts;²⁸ but in a majority of the cases that have been decided since the rendering of the opinion in the Ritter Case, that case has either been repudiated or distinguished, it being generally considered that that state of mind which induces suicide, if it arises after the inception of the policy, is one of the risks assumed by the insurer.²⁹

In all jurisdictions it is recognized that a policy procured by a person with intent to commit suicide is characterized by fraud in its inception, and is therefore voidable at the option of the insurer.³⁰ By statute, in one state at least, it has been expressly enacted that suicide of the insured shall not be a defense to an action on the policy, unless it be proved that the policy was procured with an intention to commit suicide.³¹ The constitutionality of this statute has been established beyond question, both by the state and the federal supreme courts.³²

²⁸ *AMICABLE SOCIETY v. BOLLAND*, 4 Bligh (N. S.) 194-211; *BORRADAILE v. HUNTER*, 5 Man. & G. 639; *Clift v. Schwabe*, 3 C. B. 437; *Breasted v. Trust Co.*, 8 N. Y. 290, 59 Am. Dec. 482; *Bradley v. Insurance Co.*, 45 N. Y. 422, 6 Am. Rep. 115; *Smith v. Society*, 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616; *Shipman v. Protected Home Circle*, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347; *Mooney v. Ancient Order*, 24 Ky. Law Rep. 1787, 72 S. W. 288; *Supreme Commandery of Knights of Golden Rule v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332.

²⁹ In *Morton v. Supreme Council*, 100 Mo. App. 76, 73 S. W. 259, the court thus expresses this view of the question: "Moreover, self-destruction always indicates, if not insanity, at least an irresponsible state of mind, and may well be considered a part of the risk assumed, if not specially excluded. For this reason the doctrine in question is not welcomed by all courts, and seemingly not by those of this state, which hold that a company doing a life insurance business takes a risk on an insured person's life subject to all his human passions and frailties. *Harper's Adm'r v. Insurance Co.*, 19 Mo. 506; *McDonald v. Triple Alliance*, 57 Mo. App. 87." *Campbell v. Supreme Conclave*, 66 N. J. Law, 274, 49 Atl. 550, 54 L. R. A. 576.

³⁰ *Smith v. Society*, 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616. In *RITTER v. INSURANCE CO.*, 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693, it was held that taking out policies requiring annual premium payments much greater than the insured's income was, in view of a previously expressed intention to commit suicide, sufficient proof of a fraudulent intent at the time of procuring the policies. *Parker v. Insurance Co.*, 108 Iowa, 117, 78 N. W. 826; *Supreme Conclave Improved Order of Heptasophs v. Miles*, 92 Md. 613, 48 Atl. 845, 84 Am. St. Rep. 523.

³¹ The Missouri statute reads as follows (Rev. St. 1889, § 5855): "In all

³² *Knights Templars' & Masons' Life Indemnity Co. v. Jarman*, 187 U. S. 197, 23 Sup. Ct. 106, 47 L. Ed. 139.

When the Policy is Payable to a Third Person.

In applying the doctrine that suicide is an implied exception to the risk assumed by the life insurer, many courts make a distinction between policies payable to the estate of the insured and those payable to some third person other than the insured as beneficiary. Some of those states, holding that suicide of the insured defeats the policy of the first class, on the ground that to hold otherwise would be allowing the personal representatives of the insured, who stand in his shoes, to reap the benefit of his wrongful act, have decided that the beneficiary may recover in spite of the suicide of the insured.³³ This latter view is based upon the theory that the interest of the beneficiary becomes vested immediately upon the valid issue of the policy, and cannot be subject to be defeated by any act of the insured to which the beneficiary is not a party.³⁴ Such an exception to the operation of the rule in favor of the beneficiary is certainly not justified by the reasoning of the court in the Ritter Case, and has been denied in a recent case in the federal Circuit Court.³⁵ Further, there seems to be no good reason why the bene-

suits upon policies of insurance on life, hereafter issued by any company doing business in this state, it shall be no defense that the insured committed suicide, unless it shall be shown to the satisfaction of the court or jury trying the cause that the insured contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void."

³³ *Fitch v. Insurance Co.*, 59 N. Y. 557, 17 Am. Rep. 372; *PATTERSON v. INSURANCE CO.*, 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. Rep. 899; *SEILER v. ASSOCIATION*, 105 Iowa, 87, 74 N. W. 941, 43 L. R. A. 537; *Shipman v. Protected Circle*, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347; *Darrow v. Society*, 116 N. Y. 537, 22 N. E. 1093, 6 L. R. A. 495, 15 Am. St. Rep. 430; *Morris v. Insurance Co.*, 183 Pa. 563, 39 Atl. 52; *Kerr v. Association*, 39 Minn. 174, 39 N. W. 312, 12 Am. St. Rep. 631; *Grand Lodge Independent Order of Mutual Aid v. Wieting*, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123. *Contra*, *Hopkins v. Assurance Co. (C. C.)* 94 Fed. 729.

³⁴ Hence the doctrine is of no avail to the beneficiary under a mutual benefit certificate seeking to recover for the suicidal death of the insured, since the rights of such beneficiary are not vested. *Shipman v. Protected Circle*, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347. But see, *contra*, *Parker v. Association*, 108 Iowa, 117, 78 N. W. 826.

³⁵ In *Hopkins v. Assurance Co. (C. C.)* 94 Fed. 729, *McPherson, J.*, in reference to *Morris v. Assurance Co.*, 183 Pa. 563, 39 Atl. 52, said: "With much respect for the opinion of that court, we are constrained to believe that this view of the contract was not sufficiently considered, for it is not discussed, and the decision appears to rest mainly upon the ground that the insured cannot defeat the gift to the beneficiary by his own fraudulent conduct afterwards. It seems to us that this begs the question. The beneficiary does not receive a gift of policy against suicide, for the contract does not cover death by such an act, and therefore the insured does not take away what he did not and could not give. But, whatever weight should be allowed to this case in the courts of the state, we are bound to follow the decision in *RITTER v. INSURANCE CO.*, and this is founded upon the princi-

ficiary's rights under the policy should not be defeated by the insured's violation of the implied condition against suicide, as well as by his default in the payment of premiums, or his violation of any other condition of the contract.

When the Insured is Insane.

It is manifest that an insane act of self-destruction is not subject to any of the rules that have been stated above as applicable to the intentional suicide of a sane person. It is therefore a settled rule in all jurisdictions that, in the absence of express conditions to the contrary, the suicide of an insured while insane does not discharge the insurer from his liability on his contract.³⁶ Such insanity is one of the diseases to which the insurer must have known that the insured was liable, and the unwitting act of self-destruction is as much the consequence of that disease as if some vital organ were thereby fatally affected.³⁷

SUICIDE—WHEN EXCEPTED IN THE POLICY.

197. A mere exception of death by suicide is construed to include only cases of self-destruction while sane.
198. Within this rule, in accordance with the American cases, the insured is deemed to be insane when he is in such a mental condition as not to understand the moral quality of his act. Under the English rule the insured is considered insane only when he is unable to understand the physical consequences of his act.
199. **SANE OR INSANE**—When the policy excludes death by suicide, sane or insane, it is held by the weight of authority that any intentional act of self-destruction by the insured, will discharge the insurer from liability.

Suicide Excepted.

Where the policy contains a clause excepting from among the risks assumed by the insurer "death by suicide," or words of similar import, it is universally held by the courts that the exception refers only to suicide of the insured while sane, and has no application to his self-destruction due to the misfortune of insanity.³⁸

ple that recovery cannot be had because the company has not insured against this particular risk."

³⁶ Grand Lodge Independent Order of Mutual Aid v. Wieting, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123; John Hancock Mut. Life Ins. Co. v. Moore, 34 Mich. 46; Connecticut Mut. Life Ins. Co. v. Groom, 86 Pa. 92, 27 Am. Rep. 689; Schultz v. Insurance Co., 40 Ohio St. 217, 48 Am. Rep. 676; Breast v. Trust Co., 8 N. Y. 299, 59 Am. Dec. 482.

³⁷ John Hancock Mut. Life Ins. Co. v. Moore, 34 Mich. 46; Grand Lodge Independent Order of Mutual Aid v. Wieting, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123.

³⁸ Blackstone v. Insurance Co., 74 Mich. 592, 42 N. W. 156, 3 L. R. A. 486; ACCIDENT INS. CO. v. CRANDAL, 120 U. S. 527, 7 Sup. Ct. 685, 30 L. Ed.

What Constitutes Insanity.

The construction of this and similar clauses has given rise to much litigation, in the course of which there have developed two rules for determining what constitutes insanity, within the rule that self-destruction by the insured while insane does not violate this condition.

English Rule.

The English courts, followed by those of Massachusetts and New York, have established the rule that one committing suicide shall be deemed to have been sane when at the time of the act of self-destruction he understood the physical consequences which would result from his violent acts, and desired that these consequences should be death.³⁹ In accordance with this rule, the insured's appreciation of the moral turpitude of his act is material only as affording evidence of his knowledge of the physical consequences.

The American Rule.

The Supreme Court of the United States, followed by a great majority of the American courts, has laid down a different rule, which may be properly stated in the language of Mr. Justice Hunt in the leading case of Mutual Life Ins. Co. v. Terry:⁴⁰ "We hold the rule in

740. In this case the court said that neither self-killing, suicide, dying by his own hand, nor self-inflicted injuries can be predicated on the act of an insane person, as in either case it is not his act. Knickerbocker Life Ins. Co. v. Peters, 42 Md. 414; Hathaway's Adm'r v. Insurance Co., 48 Vt. 336; Meacham v. Insurance Co., 120 N. Y. 237, 24 N. E. 283; Scheffer v. Insurance Co., 25 Minn. 534; Life Association v. Waller, 57 Ga. 533; Eastabrook v. Insurance Co., 54 Me. 224, 89 Am. Dec. 743; Phillips v. Insurance Co., 26 La. Ann. 404, 21 Am. Rep. 549. But see Cooper v. Insurance Co., 102 Mass. 227, 3 Am. Rep. 451, in which it was held that the provision in a policy excepting from the risk assumed the death of the insured caused by his own hand operated to exempt the insurers from liability, even if the suicide was committed while the insured was insane. To the same effect, see Nimick v. Insurance Co., 3 Brewst. (Pa.) 502, Fed. Cas. No. 10,266.

³⁹ BORRADAILE v. HUNTER, 5 Man. & G. 639, 44 E. C. L. 335; Cooper v. Insurance Co., 102 Mass. 227, 3 Am. Rep. 451; Van Zandt v. Insurance Co., 65 N. Y. 169, 173, 14 Am. Rep. 215; Dean v. Insurance Co., 4 Allen (Mass.) 96; Nimick v. Insurance Co., 3 Brewst. (Pa.) 502, Fed. Cas. No. 10,266; Weed v. Insurance Co., 70 N. Y. 561. See, also, Equitable Life Assur. Soc. v. Paterson, 41 Ga. 338, 5 Am. Rep. 535.

⁴⁰ MUTUAL LIFE INS. CO. v. TERRY, 15 Wall. (U. S.) 580, 21 L. Ed. 236. See, also, Connecticut Mut. Life Ins. Co. v. Akens, 150 U. S. 468, 14 Sup. Ct. 155, 37 L. Ed. 1148; RITTER v. INSURANCE CO., 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693; Grand Lodge Independent Order of Mutual Aid v. Wieting, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123; BIGELOW v. INSURANCE CO., 93 U. S. 284, 23 L. Ed. 918; ACCIDENT INS. CO. v. CRANDAL, 120 U. S. 527, 7 Sup. Ct. 685, 30 L. Ed. 740; Connecticut Mut. Life Ins. Co. v. Lathrop, 111 U. S. 612, 4 Sup. Ct. 533, 28 L. Ed. 536; Manhattan Life Ins. Co. v. Broughton, 109 U. S. 121, 3 Sup. Ct. 99, 27 L. Ed. 878; Charter Oak Life Ins. Co. v. Rodel, 95 U. S. 232, 24 L. Ed. 433; Michigan Mut. Life Ins. Co. v.

question to be this: If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery. If the death is caused by the voluntary act of the insured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable."

"Suicide, Sane or Insane."

In order to escape the operation of the liberal rule established by the Supreme Court as to what constitutes insane suicide, later policies have uniformly included a condition against suicide, "sane or insane." This has been held to be valid and enforceable.⁴¹ There can certainly be no reason why the insurer should not decline to assume the risk incident to the violence of insanity; but consistently with the general rule of the courts to construe the insurance policy in such a way as to avoid a forfeiture and to enforce the contract, if possible, the courts generally hold that this condition does not include accidental death, even though the act of the insured may have been the unintended means of causing that death.⁴² Some courts have even gone so far as to hold that where an insured person becomes so violently insane as to make his destructive acts merely those of a raving maniac, and not due to any exercise of volition, the condition is not violated, and the insurer is liable.⁴³ By

Naugle, 130 Ind. 79, 29 N. E. 393; Knickerbocker Life Ins. Co. v. Peters, 42 Md. 414; Grand Lodge Independent Order of Mutual Aid v. Wieting, 163 Ill. 403, 48 N. E. 59, 61 Am. St. Rep. 123; Mutual Benefit Life Ins. Co. v. Davies' Ex'r, 87 Ky. 541, 9 S. W. 812; Blackstone v. Insurance Co., 74 Mich. 592, 42 N. W. 156, 3 L. R. A. 486; Mutual Life Ins. Co. v. Walden (Tex. Civ. App.) 26 S. W. 1012; New Home Ass'n v. Hagler, 29 Ill. App. 437; Suppiger v. Association, 20 Ill. App. 595; Connecticut Mut. Life Ins. Co. v. Moore, 1 Flap. 363, Fed. Cas. No. 9,755.

⁴¹ BIGELOW v. INSURANCE CO., 93 U. S. 284, 23 L. Ed. 918; Salentine v. Insurance Co. (C. C.) 24 Fed. 159; Union Mut. Life Ins. Co. v. Payne, 105 Fed. 172, 45 C. C. A. 193; Dennis v. Insurance Co., 84 Cal. 570, 24 Pac. 120; Sparks v. Indemnity Co., 61 Mo. App. 109; Union Cent. Life Ins. Co. v. Holwell, 14 Ind. App. 611, 43 N. E. 27; Tritschler v. Association, 180 Pa. 205, 36 Atl. 734; Sargeant v. Insurance Co., 189 Pa. 341, 41 Atl. 351; Keefer v. Modern Woodmen, 203 Pa. 131, 52 Atl. 164.

⁴² Union Mut. Life Ins. Co. v. Payne, 105 Fed. 172, 45 C. C. A. 193; Mutual Benefit Life Ins. Co. v. Davies' Ex'r, 87 Ky. 541, 9 S. W. 812; Keels v. Association (C. C.) 29 Fed. 198.

⁴³ Supreme Lodge Order of Mutual Protection v. Gelbke, 198 Ill. 365, 64 N. E. 1058, reversing 100 Ill. App. 190; Mutual Benefit Life Ins. Co. v. Davies' Ex'r, 87 Ky. 541, 9 S. W. 812.

the weight of authority, however, any destructive act of an insane man, even though its physical consequences were not known or intended, constitutes a breach of condition.⁴⁴ This would seem clearly to be the sound construction of the condition.

Presumptions.

Self-destruction is so contrary to the law of nature and the ordinary rule of conduct that it is never presumed.⁴⁵ The insurer setting up suicide in defense must clearly establish such facts as will exclude any reasonable hypothesis of accidental death.⁴⁶ On the other hand, if the plaintiff desires to show that a death proved to be suicidal was due to the insanity of the insured, the burden rests upon him to prove the existence of such insanity, which will never be presumed.⁴⁷

⁴⁴ BIGELOW v. INSURANCE CO., 93 U. S. 284, 23 L. Ed. 918; Streeter v. Society, 65 Mich. 201, 31 N. W. 780, 8 Am. St. Rep. 883; Brower v. Supreme Lodge, 74 Mo. App. 495; Dennis v. Insurance Co., 84 Cal. 570, 24 Pac. 120; Sparks v. Indemnity Co., 61 Mo. App. 109; Union Cent. Life Ins. Co. v. Holwell, 14 Ind. App. 611, 43 N. E. 277; Sabin v. Union, 90 Mich. 177, 51 N. W. 202.

⁴⁵ Supreme Lodge K. P. v. Beck, 181 U. S. 49, 21 Sup. Ct. 532, 45 L. Ed. 741; Home Benefit Ass'n v. Sargent, 142 U. S. 691, 12 Sup. Ct. 332, 35 L. Ed. 1160; TRAVELERS' INS. CO. v. McCONKEY, 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. Ed. 308; Union Mut. Life Ins. Co. v. Payne, 105 Fed. 172, 45 C. C. A. 193; Connecticut Mut. Life Ins. Co. v. McWhirter, 73 Fed. 444, 19 C. C. A. 519; Supreme Lodge K. P. v. Beck, 94 Fed. 751, 36 C. C. A. 467; Keels v. Association (C. C.) 29 Fed. 198. "The love of life is ordinarily a sufficient inducement for its preservation, and, in the absence of proof that death resulted from other than natural causes, suicide will not be presumed." Hale v. Investment Co., 61 Minn. 516, 63 N. W. 1108, 52 Am. St. Rep. 616. Mutual Life Ins. Co. v. Wiswell, 56 Kan. 756, 44 Pac. 996, 35 L. R. A. 258; Walcott v. Insurance Co., 64 Vt. 221, 24 Atl. 992, 33 Am. St. Rep. 923; Agen v. Insurance Co., 105 Wis. 217, 80 N. W. 1020, 76 Am. St. Rep. 905; Carnes v. Association, 106 Iowa, 281, 76 N. W. 683, 68 Am. St. Rep. 306; Dennis v. Insurance Co., 84 Cal. 570, 24 Pac. 120; Inghram v. Union, 103 Iowa, 395, 72 N. W. 559.

⁴⁶ Boynton v. Association, 105 La. 202, 29 South. 490, 52 L. R. A. 687; Keels v. Association (C. C.) 29 Fed. 198; Leman v. Insurance Co., 46 La. Ann. 1189, 15 South. 383, 24 L. R. A. 589, 49 Am. St. Rep. 348; Mutual Life Ins. Co. v. Wiswell, 56 Kan. 756, 44 Pac. 996, 35 L. R. A. 258. "Upon evenly balanced testimony, the law assumes innocence rather than crime." Walcott v. Insurance Co., 64 Vt. 221, 24 Atl. 992, 33 Am. St. Rep. 923. Agen v. Insurance Co., 105 Wis. 217, 80 N. W. 1020, 76 Am. St. Rep. 905; Stephenson v. Association, 108 Iowa, 637, 79 N. W. 459; Travelers' Ins. Co. v. Nitterhouse, 11 Ind. App. 155, 38 N. E. 1110; Dennis v. Insurance Co., 84 Cal. 570, 24 Pac. 120; Inghram v. Union, 103 Iowa, 395, 72 N. W. 559; MUTUAL LIFE INS. CO. v. SIMPSON (Tex. Civ. App.) 28 S. W. 837.

⁴⁷ Waters v. Insurance Co. (C. C.) 2 Fed. 892; MUTUAL LIFE INS. CO. v. TERRY, 15 Wall. 580, 21 L. Ed. 236; TRAVELERS' INS. CO. v. McCONKEY, 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. Ed. 308; Knickerbocker Life Ins. Co. v. Peters, 42 Md. 414; Continental Ins. Co. v. Delpuch, 82 Pa. 226; Phaderbauer v. Insurance Co., 7 Heisk. (Tenn.) 567, 19 Am. Rep. 623; Moore v. Insurance Co., 1 Flap. 363, Fed. Cas. No. 9,755; Dickerson v. Insurance Co., 200 Ill. 270, 65 N. E. 694.

DEATH IN VIOLATION OF LAW.

200. The insurer is not liable for the death of the insured at the hands of the law, even though such risk is not expressly excepted in the policy.
201. An exception, in the policy, of death because of violation of law, includes only those cases in which death ensues as the proximate result of the criminal act of the insured. By the weight of authority it does not include suicide, or death in violation of a merely civil right.

Death at the Hands of the Law.

Most policies of life insurance contain a clause exempting the insurer from liability for the death of the insured in consequence of the known violation of any law or at the hands of justice. It has been held, however, by both the Supreme Court of the United States⁴⁸ and the English House of Lords,⁴⁹ that, even in the absence of such an exception, the insurer could not be required to pay in case the insured came to his death by the execution of a legally imposed sentence.

The Supreme Court of the United States, in the case of *Burt v. Union Cent. Life Ins. Co.*,⁵⁰ has carried this principle even further than this. In that case the insured was executed for the murder of his wife. The assignees of the policy brought suit against the insurance company, claiming payment on the ground that the insured had been unjustly sentenced and executed, since he was not guilty of the crime with which he was charged. The lower court declined to receive any evidence upon this point, and its ruling was sustained by the Supreme Court, not on the ground that the question was *res adjudicata*, but because to allow proof that the insured had been unjustly executed, and thereby to render the insurer liable on his policy, would be tantamount to construing a contract as insurance against the miscarriage of justice, which would be contrary to public policy.

Death in Known Violation of Law.

This condition is evidently inserted in the life policy for the purpose of exempting the insurer from the largely increased risk of death assumed by any person violating a criminal law. This purpose the courts keep in mind in construing such clauses. It is held that the clause applies only to cases involving the violation of a criminal law, and not merely the invasion of a civil right. This is well illustrated by the famous case of *Cluff v. Mutual Ben. Life Ins. Co.*,⁵¹ which was four

⁴⁸ *Burt v. Insurance Co.*, 187 U. S. 362, 23 Sup. Ct. 139, 47 L. Ed. 216. Contra, *McDonald v. Order of Triple Alliance*, 57 Mo. App. 87.

⁴⁹ *AMICABLE SOCIETY v. BOLLAND*, 4 Bligh, N. S. 194.

⁵⁰ 187 U. S. 362, 23 Sup. Ct. 139, 47 L. Ed. 216.

⁵¹ *Cluff v. Insurance Co.*, 13 Allen (Mass.) 308. See same case, 99 Mass. 318.

times tried in Massachusetts, being twice before the Supreme Court of that state. A case involving the same facts and a similar policy subsequently came before the Court of Appeals of New York. In this case *Cluff*, the insured, meeting an alleged debtor on the public road, demanded payment. This being refused, *Cluff* attempted to seize the horses then in the possession of the debtor. Being greatly incensed by this act, the latter shot and instantly killed the insured. It was held by the Supreme Court of Massachusetts that although *Cluff* was violating the law in seizing another person's property, yet, since it was not done with a criminal intent, the law violated was merely a rule of civil conduct, and not within the contemplation of the parties to the contract of insurance, which contained the usual clause exempting the insurer from loss in consequence of the violation of law. In the New York court⁵² a judgment for the defendant was reversed on the ground that the lower court should have submitted to the jury the question whether the wrongful act of *Cluff* was the proximate cause of the insured's death.⁵³

Suicide not a "Violation of Law."

By the weight of authority it is held that the suicide of the insured is not a violation of this clause, within the contemplation of the parties.⁵⁴ This is clearly correct in those jurisdictions in which the common-law crimes have been abolished and suicide is not included within the list of statutory crimes. But the conclusion is not so easily reached in those states in which the common-law crimes are still recognized. Suicide was undoubtedly a crime at common law, but it has generally been held that, even though suicide may still be technically a common-law crime, it will not be regarded as a crime within the meaning of this clause of the insurance policy, since no punishment can be imposed for its commission.⁵⁵ In a recent New York case,⁵⁶ however, a contrary conclusion was reached.

⁵² *Bradley v. Insurance Co.*, 45 N. Y. 422, 6 Am. Rep. 115.

⁵³ In *Lehman v. Indemnity Co.*, 158 N. Y. 689, 53 N. E. 1127, affirming 7 App. Div. 424, 39 N. Y. Supp. 912, it was held that the act of the insured in walking along a railway track, though forbidden by law, was not a "violation of law," within the meaning of this clause, when the railway company had impliedly licensed such act.

⁵⁴ *Kerr v. Association*, 39 Minn. 174, 39 N. W. 312, 12 Am. St. Rep. 631; *PATTERSON v. INSURANCE CO.*, 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. Rep. 899. So in New York, where common-law crimes have been abolished. *Darrow v. Society*, 116 N. Y. 537, 22 N. E. 1093, 6 L. R. A. 495, 15 Am. St. Rep. 430; *Royal Circle v. Achterrath*, 204 Ill. 549, 63 N. E. 492, 63 L. R. A. 452. But see *Shipman v. Home Circle*, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347, in which it was held otherwise under Pen. Code, § 172.

⁵⁵ *PATTERSON v. INSURANCE CO.*, 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. Rep. 899.

⁵⁶ *Shipman v. Home Circle*, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347.

The Unlawful Act must be Proximate Cause of Death.

It is not sufficient to exempt the insurer from liability that the insured should meet his death while violating the law. The death must have ensued in consequence of that violation.⁵⁷ In the language of the court in a recent Tennessee case:⁵⁸ "In order to defeat a recovery because of such provision, there must appear a connecting link between the unlawful act and the death. It is not sufficient that there was an unlawful act committed by the insured, and that death occurred during the time he was engaged in its commission. There must be some causative connection between the act which constituted the violation of the law and the death of the insured. * * * The provision of the policy excluding liability for injury received by the insured while committing an unlawful act refers to such injuries as may happen as the necessary or natural consequences of the act, as its probable and to be anticipated consequences, and the reference to injuries received 'in consequence of any unlawful act' is to those injuries which arise out of or flow naturally from the act committed, as its effect or resulting consequence."

In a recent decision by the Supreme Court of the United States it was held that where a man was killed by the accidental discharge of a gun while he was engaged in a wrongful and violent attempt to recover possession of his wife, who had rightfully left him, the company should be held liable for the death of the insured, since there was no causative connection between the wrong he contemplated and the cause of his death.⁵⁹ So it was held that the suicide of an insured, committed in order to escape arrest for a crime perpetrated, was not the proximate result of the crime, and therefore not within this clause of the policy.⁶⁰

But while the death of the insured must be due proximately to the violation of law, it need not be directly due to that cause. Thus it has been held that when the insured came to his death by reason of a collision that took place during a horse race that was being run contrary to

⁵⁷ *Conboy v. Accident Ass'n*, 17 Ind. App. 62, 46 N. E. 363, 60 Am. St. Rep. 154; *Accident Ins. Co. v. Bennett*, 90 Tenn. 256, 16 S. W. 723, 25 Am. St. Rep. 685; *Goetzman v. Insurance Co.*, 3 Hun (N. Y.) 515; *Bradley v. Insurance Co.*, 45 N. Y. 422, 6 Am. Rep. 115; *BLOOM v. INSURANCE CO.*, 97 Ind. 478, 49 Am. Rep. 469; *Jones v. Accident Ass'n*, 92 Iowa, 653, 61 N. W. 485; *Travelers' Ins. Co. v. Seaver*, 19 Wall. 531, 22 L. Ed. 155; *MURRAY v. INSURANCE CO.*, 96 N. Y. 614, 48 Am. Rep. 658. But see *Griffin v. Western Ass'n*, 20 Neb. 620, 31 N. W. 122, 57 Am. Rep. 848, where it was held that, although the insured was killed while making his escape after having robbed a bank, he was not killed while violating the law, his act of robbing the bank, which was in violation of the law, having been consummated, and accordingly the policy was not avoided.

⁵⁸ *Accident Ins. Co. v. Bennett*, 90 Tenn. 256, 16 S. W. 723, 25 Am. St. Rep. 685.

⁵⁹ *Supreme Lodge K. P. v. Beck*, 181 U. S. 49, 21 Sup. Ct. 532, 45 L. Ed. 741.

⁶⁰ *Kerr v. Benefit Ass'n*, 39 Minn. 174, 39 N. W. 312, 12 Am. St. Rep. 631.

law, the insurer was not liable.⁶¹ Likewise it has been held that when the insured was accidentally killed while returning from a hunting expedition, in which he had unlawfully engaged on Sunday, the insurer was exempted under the clause in question.⁶² But where such a Sunday sportsman met an accidental death after returning from the hunt and while at a friend's house, the violation of law was considered not to be the cause of his death.⁶³ Under this clause the insurer was likewise discharged when the insured died by reason of a criminal operation to which she had submitted,⁶⁴ and also when an insured was killed by the husband of a woman upon whom he was committing an assault and battery.⁶⁵ There seems to be some difference of opinion whether the insurer is liable when the insured is killed while retreating from an altercation in which he had wrongfully engaged. The better view would seem to be that death under such circumstances is proximately caused by the illegal altercation.⁶⁶

ASSIGNMENT.

202. In the absence of any condition in the policy prohibiting assignment, a validly issued life policy may be freely assigned, irrespective of the consent of the insurer.

203. Life policies usually provide that no assignment thereof shall be valid unless indorsed upon the policy by the insurer, or unless notice in writing is given to the insurer. Failure to comply with such requirements has no effect whatever upon the validity of the assignment, nor does it deprive the assignee of any of his equitable rights against the insurer. An assignment in accordance with the condition of the policy in effect constitutes the assignee a party to the contract, which he may enforce in an action at law.

204. It seems that a condition avoiding the policy in case of assignment without consent of the insurer is valid and enforceable.

The insurer does not look to the character of the insured to such an extent when he insures his life as when he insures his property. He naturally looks to the insured's reputation for honesty and carefulness, when insuring his property, as largely affecting the risk, but in the case of life insurance the character of the insured does not affect to any con-

⁶¹ *Travelers' Ins. Co. v. Seaver*, 19 Wall. 531, 22 L. Ed. 155.

⁶² *Duran v. Insurance Co.*, 63 Vt. 437, 22 Atl. 530, 13 L. R. A. 637, 25 Am. St. Rep. 773.

⁶³ *Prader v. Accident Ass'n*, 95 Iowa, 149, 63 N. W. 601.

⁶⁴ *Hatch v. Insurance Co.*, 120 Mass. 550, 21 Am. Rep. 541.

⁶⁵ *BLOOM v. INSURANCE CO.*, 97 Ind. 478, 49 Am. Rep. 469.

⁶⁶ *MURRAY v. INSURANCE CO.*, 96 N. Y. 614, 48 Am. Rep. 658. But see *Harper's Adm'r v. Insurance Co.*, 19 Mo. 506; *Griffin v. Western Ass'n*, 20 Neb. 620, 31 N. W. 122, 57 Am. Rep. 848.

siderable degree the character of the risk. A dishonest man can be relied upon to protect his own life with quite as much diligence as an honest man. Such being the case, the reasons which preclude an assignment of a fire policy without the consent of the insurer do not operate in the case of life insurance. By the great weight of authority, a life insurance policy, if once validly issued, is subject to assignment as any other chose in action, unless such assignment is prohibited by the contract.⁶⁷ It should be borne in mind, however, that any assignment of a life policy that is intended as an evasion of the rule of law prohibiting wager policies is absolutely void.⁶⁸

Assignment by Parol Valid.

No writing is requisite for a valid assignment, unless prescribed by the policy.⁶⁹ Any evidence showing an intention to presently assign must be sufficient to establish the assignment. No manual delivery is necessary.⁷⁰ Even when the contract prescribes that assignments must

⁶⁷ *New York Mut. Life Ins. Co. v. Armstrong*, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997; *In re Dobbel's Estate*, 104 Cal. 432, 38 Pac. 87, 43 Am. St. Rep. 123; *Morris v. Banking Co.*, 109 Ga. 12, 34 S. E. 373, 46 L. R. A. 506; *State v. Tomlinson*, 16 Ind. App. 662, 45 N. E. 1116, 59 Am. St. Rep. 335; *Hewlett v. Home for Incurables*, 74 Md. 350, 24 Atl. 324, 17 L. R. A. 449; *In re Turcan*, L. R. 40 Ch. Div. 5; *Murphy v. Red*, 64 Miss. 614, 1 South. 761, 60 Am. Rep. 68; *AMICK v. BUTLER*, 111 Ind. 578, 12 N. E. 518, 60 Am. Rep. 722; *MUTUAL LIFE INS. CO. v. ALLEN*, 138 Mass. 24, 52 Am. Rep. 245; *Davis v. Brown*, 159 Ind. 644, 65 N. E. 908; *Steele v. Gatlin*, 115 Ga. 929, 42 S. E. 253, 59 L. R. A. 129. But in many jurisdictions an assignment of a life policy to one having no insurable interest is void as against public policy, and the fact that the laws of the insurance company allow such assignment does not validate it. *Price v. Supreme Lodge*, 68 Tex. 361, 4 S. W. 633; and see cases cited ante, p. 416. In *Helmetag's Adm'r v. Miller*, 76 Ala. 183, 52 Am. Rep. 316, it was held that an insurance policy could not be assigned to one having no interest in the life of the insured, and an assignment of the policy as collateral security was void beyond the amount of the debt.

⁶⁸ *New York Mut. Life Ins. Co. v. Armstrong*, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997; *CLEMENT v. INSURANCE CO.*, 101 Tenn. 22, 46 S. W. 561, 42 L. R. A. 247, 70 Am. St. Rep. 650; *STEINBACK v. DIEPENBROCK*, 158 N. Y. 24, 52 N. E. 662, 44 L. R. A. 417, 70 Am. St. Rep. 427; *Franklin Life Ins. Co. v. Hazzard*, 41 Ind. 116, 13 Am. Rep. 313; *Roller v. Moore's Adm'r*, 86 Va. 542, 10 S. E. 241, 6 L. R. A. 136; *Alabama Gold Life Ins. Co. v. Mobile Mut. Ins. Co.*, 81 Ala. 329, 1 South. 561; *Ruth v. Katterman*, 112 Pa. 251, 3 Atl. 833.

⁶⁹ *Hani v. Insurance Co.*, 197 Pa. 276, 47 Atl. 200, 80 Am. St. Rep. 819; *O'Brien v. Insurance Co.*, 57 Hun, 589, 11 N. Y. Supp. 125; *Travelers' Ins. Co. v. Healey*, 86 Hun, 524, 33 N. Y. Supp. 911; *Macauley v. Bank*, 27 S. C. 215, 3 S. E. 193.

⁷⁰ *Colburn's Appeal*, 74 Conn. 463, 51 Atl. 139, 92 Am. St. Rep. 231. See *Richardson v. White*, 167 Mass. 58, 44 N. E. 1072; *McDonough v. Insurance Co.*, 38 Misc. Rep. 625, 78 N. Y. Supp. 217; *Chamberlain v. Williams*, 62 Ill. App. 423; *Hurlbut v. Hurlbut*, 49 Hun, 189, 1 N. Y. Supp. 854. But the execution of an assignment by a son to his mother, without consideration,

be written on the policy by the insurer, a parol assignment will nevertheless be valid as between assignor and assignee.

Assignment Prohibited by Policy.

Modern policies usually contain a condition to the effect that no assignment will be valid until notice is given to the insurer.⁷¹ Older forms sometimes contain the harsh provision that the assignment of a policy without the consent of the insurer shall render it void. While such a provision will receive little favor at the hands of the courts in the way of construction, yet, if violated, it seems the court must give it full effect in accordance with its terms.⁷²

The ordinary provision, however, prohibiting an assignment without proper notice to the insurer, is construed to be intended merely for the benefit of the insurer, and cannot affect the rights between the assignor and the assignee.⁷³ The assignee will nevertheless take an equitable title to the proceeds of the policy, which the insurer may recognize, if he so desires, and discharge his liability by making payment to such assignee. Indeed, it seems probable that the only effect of such a condition in the life policy is to give the insurer a right to decline payment to an assignee claimant until the condition has been complied with.⁷⁴ It is doubtful, however, whether the insurer, after receiving actual notice of the assignment, even though not in accordance with the requirements of the condition, would be justified in making payment to the assignor or his personal representatives.

An assignment made in compliance with the conditions of the policy, and therefore with the consent of the insurer, in effect constitutes the assignee a party to the contract, so as to entitle him to bring a suit on the policy in his own name.⁷⁵ Of course, however, his rights under the policy could not be greater than those of his assignor, unless the assignment was made under such circumstances as to constitute a waiver of previously existing grounds of forfeiture.

though made according to the requirements of the company, will not be valid without delivery as against a subsequent assignee for value. See *Weaver v. Weaver*, 182 Ill. 287, 55 N. E. 338, 74 Am. St. Rep. 173.

⁷¹ In Iowa such prohibitions against assignments are void by statute. See *Crocker v. Hugin*, 103 Iowa, 243, 72 N. W. 411.

⁷² *Unity Mut. Life Assur. Ass'n v. Dugan*, 118 Mass. 219; *Stevens v. Warren*, 101 Mass. 564. See, also, dicta in *Merrill v. Insurance Co.*, 103 Mass. 245, 252, 4 Am. Rep. 548, and *Hewins v. Baker*, 161 Mass. 320, 37 N. E. 441.

⁷³ *Mut. Protection Ins. Co. v. Hamilton*, 5 Sneed (Tenn.) 269; *Hogue v. Provision Co.*, 59 Minn. 39, 60 N. W. 812; *Hewins v. Baker*, 161 Mass. 320, 37 N. E. 441. See, especially, the opinion in *New York Life Ins. Co. v. Flack*, 8 Md. 341, 56 Am. Dec. 742.

⁷⁴ See *Hewins v. Baker*, 161 Mass. 320, 37 N. E. 441.

⁷⁵ *Tremblay v. Insurance Co.*, 97 Me. 547, 55 Atl. 509, 94 Am. St. Rep. 521; *Southern Fertilizer Co. v. Reames*, 105 N. C. 283, 11 S. E. 467.

INCONTESTABLE CLAUSE.

205. The incontestable clause applies only to such defenses as arise before loss, and does not affect those conditions to be performed after the death of the insured. The clause is valid, and all such defenses as are not expressly excepted in the clause are barred to the insurer, except—
- (a) Lack of insurable interest in the person procuring the insurance, rendering the contract illegal in its inception.
 - (b) Fraud in the procurement of the insurance, entitling the insurer to rescind the entire contract. This exception is sound in principle, but is denied by the weight of authority.

The incontestable clause, now so popular in life insurance contracts, is an anomaly in contract law, and the decisions of the courts in determining its effect upon the conditions of the contract are quite as anomalous as the condition itself. In most policies there are certain exceptions expressly made to the operation of this incontestable clause, the most frequent one being the payment of premiums, as where it is provided that after a certain period "this policy shall be incontestable, provided all premiums that have become due shall have been paid." Other forms except fraud in the procurement, and suicide.⁷⁶ Where one of these expressly excepted conditions has been violated, there is no difficulty in determining that the insurer is not liable, but great difficulty is encountered in determining the effect of the breach of a condition not excepted from the operation of the incontestable clause, but yet distinctly set forth as one of the terms of the contract. If one were allowed to theorize unreservedly in the matter, he would reach the conclusion that the statement in the contract that the contract was incontestable should mean merely that the insurer had estopped himself to deny the validity of the contract as executed, and not the operation of the terms of the contract as written. In accordance with such a view, the insurer would not be allowed to deny the valid existence of the policy as a subsisting contract of insurance, unless it had been procured by actual fraud, but he would not be precluded from insisting that the confessedly valid contract should operate in accordance with its written terms.

⁷⁶ In *Fitch v. Insurance Co.*, 59 N. Y. 570, 17 Am. Rep. 372, the court said: "A company cannot be permitted in the same papers to say to the insured, to induce him to enter into the contract, that nothing but fraud or intentional misstatements shall avoid his policy, or that payment will be contested only in case of fraud, and, when the claim for payment is presented, to set up in defense a merely technical breach of warranty in relation to some trivial matter." See, also, *Wood v. Dwaris*, 11 Exch. 493, 25 L. J. Exch. (N. S.) 129; *Kilne v. Benefit Ass'n*, 111 Ind. 462, 11 N. E. 620, 60 Am. Rep. 708. Here it was held that nonpayment of premium was no defense against a beneficiary where the policy and application recited payment, and the policy contained a clause providing that it was incontestable except for fraud.

Thus we should expect to find that such a defense as an innocent misrepresentation or breach of warranty would not be good under the incontestable clause, but that suicide, when expressly prohibited by a term of the contract, would afford a good defense; but such is certainly not the result of the cases so far as decided. The courts seem inclined to construe the clause as an agreement on the part of the insurer not to contest his ultimate liability to pay the sum specified, whereas the insurer merely binds himself not to contest the policy. It is well settled that under the incontestable clause the insurer is precluded from setting up the suicide of the insured in defense, even when the policy expressly stipulates that the insurer will not be liable in case of death by suicide;⁷⁷ yet it is held that the incontestable clause will not prevent a failure on the part of the party in interest to furnish proofs of loss, or to bring his action within the stipulated time, from defeating his rights under the contract.⁷⁸ In view of these authorities, we may say that the law, so far as it is expressible on this subject, is as follows:

The incontestable clause precludes the insurer from setting up in his defense the breach of any condition that operates prior to the loss insured against, but it does not affect the operation of conditions concerning matters after loss.

Lack of Insurable Interest.

Even the incontestable clause cannot abrogate the fundamental rule of public policy prohibiting speculation in human life and the making

⁷⁷ *Royal Circle v. Achterrath*, 204 Ill. 549, 68 N. E. 492, 63 L. R. A. 452; *Marek v. Life Ass'n*, 62 Minn. 39, 64 N. W. 68, 54 Am. St. Rep. 613; *Simpson v. Insurance Co.*, 115 N. C. 393, 20 S. E. 517; *Goodwin v. Assurance Ass'n*, 97 Iowa, 226, 66 N. W. 157, 32 L. R. A. 473, 59 Am. St. Rep. 411; *Supreme Court of Honor v. Updegraff* (Kan. 1904) 75 Pac. 477. In *PATTERSON v. INSURANCE CO.*, 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. Rep. 899, it is said: "The fact that insurance companies have almost universally deemed it necessary to insert in their policies provisions exempting them from liability in case of suicide, 'sane or insane,' may, perhaps, also be considered as showing the general trend of opinion upon the subject in insurance circles; but, whether this deduction is to be properly drawn or not, we think it certain that the fact that life insurance policies universally contain this provision is of weight in determining the construction to be placed upon a policy which omits all specific reference to suicide, and also ostentatiously contains a clause providing that it shall be absolutely incontestable for any cause save for nonpayment of premiums or misstatement of age. What would an applicant for insurance be entitled to think was the meaning of such a policy, when presented to him, garnished with the usual and customary commendations of the average solicitor of insurance? Certainly he would not think that its legal effect was the same as that of a policy containing the usual provisions against suicide, sane or insane." See, also, *Murray v. Insurance Co.*, 22 R. I. 524, 48 Atl. 800, 53 L. R. A. 742; *Mutual Reserve Fund Life Ass'n v. Payne* (Tex. Civ. App.) 32 S. W. 1063. It is clear that such a doctrine will not be countenanced by the federal Supreme Court. See *RITTER v. INSURANCE CO.*, 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693.

⁷⁸ *Brady v. Insurance Co.*, 168 Pa. 645, 32 Atl. 102.

of wagering contracts of insurance. Therefore it is well settled that a policy of insurance issued to one having no insurable interest in the life insured is not made valid by the insertion of an incontestable clause in such a thoroughly vicious contract.⁷⁹

Fraud in the Procurement of the Contract.

Since it is a fundamental rule of law that fraud vitiates consent, it would seem to be almost axiomatic that an agreement made by the insurer not to contest the validity of the contract, if procured by actual fraud, could be rescinded by the insurer. If the fraudulently procured agreement not to contest can be rescinded, there would seem to be no reason why the insurer should be bound by such an agreement contained in a policy that was procured by fraud. But, however clear this question may seem on principle, the majority of the courts before whom it has come for decision, in their jealous zeal to hold the insurer to the full measure of his liability as assumed, have held that the insurer, by the incontestable clause, has waived in advance his right to contest the validity of the policy on the ground of fraud in its procurement,⁸⁰ as if such a previous waiver would not also be invalid when induced by fraud. While there is some authority for the view indicated here as preferable on principle,⁸¹ there can be little doubt that the doctrine that the incontestable clause precludes the defense of original fraud in procuring the contract will ultimately become a settled rule in the law of life insurance.

In Kentucky it has been held that under the incontestable clause the

⁷⁹ CLEMENT v. INSURANCE CO., 101 Tenn. 22, 46 S. W. 561, 42 L. R. A. 247, 70 Am. St. Rep. 650; Anctil v. Insurance Co. [1899] A. C. 609, affirming same case, 28 Can. Sup. Ct. 103; People's Mut. Ben. Soc. v. Templeton, 16 Ind. App. 126, 44 N. E. 809. Contra, WRIGHT v. BENEFIT ASS'N, 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731, 16 Am. St. Rep. 749 (dictum).

⁸⁰ WRIGHT v. BENEFIT ASS'N, 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731, 16 Am. St. Rep. 749; Woodruff, Ins. Cas. 264; PATTERSON v. INSURANCE CO., 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. Rep. 899; CLEMENTS v. INSURANCE CO., 101 Tenn. 22, 46 S. W. 561, 42 L. R. A. 247, 70 Am. St. Rep. 650; Massachusetts Ben. Life Ass'n v. Robinson, 104 Ga. 256, 30 S. E. 919, 42 L. R. A. 261; Franklin Ins. Co. v. Villeneuve, 25 Tex. Civ. App. 356, 60 S. W. 1014; Bates v. Insurance Ass'n, 68 Hun. 144, 22 N. Y. Supp. 626, affirmed in 142 N. Y. 677, 37 N. E. 824. See, also, Teeter v. Insurance Ass'n, 11 App. Div. 259, 42 N. Y. Supp. 119; Vetter v. Life Ass'n, 29 App. Div. 72, 51 N. Y. Supp. 393; Brady v. Insurance Co., 168 Pa. 645, 32 Atl. 102.

⁸¹ WELCH v. INSURANCE CO., 108 Iowa, 224, 78 N. W. 853, 50 L. R. A. 774, Woodruff, Ins. Cas. 267; New York Life Ins. Co. v. Weaver (Ky.) 70 S. W. 623. Some cases make a distinction between policies made incontestable from date and those incontestable after the lapse of a specified time. Fraud in the procurement, it is said, is a good defense as to the former, but not as to the latter. See Massachusetts Ben. Life Ass'n v. Robinson, *supra*; Blisa, Ins. (2d Ed.) §§ 254, 255.

insurer will not be allowed to show in defense that the insured came to his death in consequence of a violation of law.⁸² But it is probable that death at the hands of justice would afford the insurer a valid defense in spite of the incontestable clause.⁸³

⁸² Sun Life Ins. Co. v. Taylor, 108 Ky. 408, 56 S. W. 668, 94 Am. St. Rep. 883.

⁸³ See Burt v. Insurance Co., 187 U. S. 181, 23 Sup. Ct. 362, 47 L. Ed. 216.

CHAPTER XV.

MARINE INSURANCE.

- 206. Scope of This Chapter.
- 207-208. Marine Policies and Their Construction.
- 209. Insurable Interest—Lost or not Lost.
- 210. Property Covered by the Insurance.
- 211. Commencement and Duration of Risk.
- 212-213. What Risks are Assumed—Proximate Causes of Loss.
- 214-217. Implied Exceptions.
- 218. Perils of the Sea.
- 219. Barratry.
- 220. Thefts.
- 221. Captures, Arrests, Restraints.
- 222. Jettison.
- 223-224. Particular and General Average Losses.
- 225-227. The Insurer's Liability—Total Loss.
- 228. Abandonment.
- 229. Sue and Labor Clause.

SCOPE OF THIS CHAPTER.

206. The purpose of this chapter is to set forth in outline only those rules of law peculiar to marine insurance. Such rules and principles as are equally applicable to other kinds of insurance will not be further discussed.

Most of the rules of law applicable to the contract of marine insurance are equally applicable to other kinds of insurance. These have already been fully discussed, and need not be further considered. Furthermore, some of the rules peculiar to marine insurance, such as that avoiding the insurance in case of the innocent nondisclosure of a material fact, have also been considered in preceding chapters of this work. These, also, will receive no further attention.

There are, however, certain well-settled rules of law that have been established by the courts as applicable only to the contract of marine insurance, which are so essentially peculiar to this branch of insurance law as not to have been mentioned heretofore. The statement of these rules is the purpose of this chapter.

MARINE POLICIES AND THEIR CONSTRUCTION.

207. In the United States there is no form of marine policy prescribed by law, but a conventional form is in general use. In England the Lloyd's policy is the standard form.
208. The same rules of construction apply to the marine policy as to other policies, save that the customs of merchants are, perhaps, given more weight in determining the meaning of the marine policy.

The Form of the Marine Contract.

In the absence of statute, there is no reason why a contract of marine insurance should not be made by parol as well as any other insurance contract. Such parol insurances are, however, very infrequent, the custom of merchants requiring a written instrument. In England every marine insurance is required by statute to be in writing,¹ and in the Continental countries the codes of commerce usually require all such contracts to be in writing, and to comply in form with many prescribed details. In England the time-honored and judicially berated Lloyd's policy is prescribed by statute as the standard form,² but in the United States no attempt has been made to establish a standard marine policy. While, therefore, in this country the forms of policies used may vary with the desires of the parties, and do so vary sometimes, yet general usage has developed a conventional form which is seldom departed from. This policy follows the general lines of the ancient Lloyd's, with the addition of the more modern "memorandum clause." This conventional policy will be found set out in the appendix.

Rules of Construction.

It is not possible or advisable to attempt, within the limits of this work, a statement of the rules of construction as applied by the courts to each of the provisions of these policies. It is sufficient to say that the general rules of construction heretofore discussed as applying to contracts of fire and life insurance also apply to marine insurance. There is, however, one seeming peculiarity of construction that should be noticed in connection with sea policies; that is, the great weight given to usage in arriving at the intention of the parties to the contract. More than any other insurance contract, the marine policy is a contract of the law merchant, and it is to be expected that the vital principle of that system of law, the custom of merchants, should be potent in fixing the rights of the parties.³ Every established usage pertinent to the insurance contracted for is said to be written into the policy,⁴ but, of course, it cannot operate to contradict or vary the clear meaning of an express term of the policy.⁵

Assignments.

The force of custom in determining the rights of parties to a contract of marine insurance is well illustrated by the rule as to assign-

¹ See 54 & 55 Vict. c. 39, § 93 (1) [1891].

² 35 Geo. III, c. 63, and 30 Vict. c. 23. It is recognized as the standard form in the marine insurance bill of 1899.

³ See *Universe Ins. Co. of Milan v. Merchants' Marine Ins. Co.* [1897] 1 Q. B. 205, 2 Q. B. 93, and 1 Arn. Ins. (7th Ed.) § 55.

⁴ *Preston v. Greenwood*, 4 Doug. 28, per Lord Mansfield.

⁵ See this subject very ably and fully discussed in 1 Duer, Ins. p. 153 et seq. Also see 1 Arn. Ins. § 56.

ments. It being the custom of merchants selling property covered by marine insurance to assign their policies to the purchasers, a rule of law has been established to the effect that the insurer remains bound to the assignee, even though he may not have consented to the assignment,⁶ unless such assignment was expressly prohibited by the policy.⁷

INSURABLE INTEREST—LOST OR NOT LOST.

209. As with other insurances, marine insurance is invalid unless supported by an insurable interest in the insured, except in the one case when insurance is taken upon a ship or cargo "lost or not lost." In such a case the insurer can be compelled to pay, even though the subject of the insurance had been totally destroyed before the making of the contract.

In the seventeenth and eighteenth centuries the custom of making wager sea policies, bearing on their faces the words "Interest or no interest," or others of similar import, became prevalent, and such insurances were, unfortunately, held valid by the courts.⁸ This vicious practice was broken up by the statute of 19 Geo. II, c. 37 (1746), and the rule of law has since become well settled everywhere that marine insurance can be valid only when protecting a real interest in the insured. The principles upon which the presence of an insurable interest is determined have already been discussed.

"Lost or not Lost."

In accordance with the general rule of insurance law, the insured must have an insurable interest at the time of the policy's inception, or one that arises thereafter. That is to say, there can be no valid insurance unless there is something to insure. When one insures a ship, which, without the knowledge of either insurer or insured, is already lost, it is plain that the contract never becomes binding, and the insurer must restore the premium. But it is held that if the insurer expressly agrees, under such circumstances, that he will be bound in any event, even though the vessel be already lost, the contract is binding, and the insurer must pay, though it be proved that the insured had nothing to insure when the contract was made. By the same token the insurer is entitled to retain the premium paid, even though the ship lay safe in harbor at the time the contract was made, and the insurer was never put to his risk.⁹ The intention of the parties that

⁶ *Sparkes v. Marshall*, 2 Bing. N. C. 761; *Earl v. Shaw*, 1 Johns. Cas. (N. Y.) 314, 1 Am. Dec. 117.

⁷ See *Alexander v. Insurance Co.*, 51 N. Y. 253.

⁸ *Dean v. Dicker*, 2 Strange, 1250 (1746). And see *Keith v. Protection Ins. Co.*, 10 L. R. Ir. 51.

⁹ *People v. Dimick*, 107 N. Y. 13, 14 N. E. 178. Of course, it would be otherwise if the vessel's safety were known to the insurer. *Id.*

insurance shall be retroactive is usually indicated by the use of the phrase "lost or not lost," although any other words clearly showing such an intention will be sufficient.¹⁰

PROPERTY COVERED BY THE INSURANCE.

210. The insurance covers any property, coming reasonably within the words of description used, that may be exposed to the perils insured against. By express agreement freight or passenger money to be earned by the vessel, or profits to be made on the cargo, may be included.

It is manifest that a marine policy may cover any property interests that may become subject to perils of the sea, barring illegality in the venture. Whether any given loss by sea perils is covered by insurance depends wholly upon the question whether the parties have so contracted; that is, upon the construction of language used in describing the subjects of the insurance. In construing such language the courts are guided by the same rules of construction heretofore considered, more weight, however, being given to usage.

The formal words of description printed in the ordinary American marine policy are, "The body, tackle, apparel, and other furniture of the good ship, or upon all kinds of lawful goods and merchandise laden or to be laden upon the good ship, or upon the freight," etc. The wording of the Lloyd's form is slightly different. These general terms may be enlarged or modified by the terms written in the policy specifically descriptive of the interests intended to be protected, the written terms, of course, prevailing over the printed words.

It is clear that insurance upon the "ship" alone would cover not only her hull, but also all those things essential to her navigation,¹¹ as her tackle and stores, or, if a steamer, her engines and machinery, and the coal in her bunkers;¹² but it is customary to mention specifically these several parts of the ship as being insured. So the provisions stored on board for the ship's crew are included under the term "furniture,"¹³ as are the various cloths and other appliances necessary to the proper carriage of grain, when the policy was upon a vessel engaged in the grain trade.¹⁴ But the outfit of a whaler used in capturing whales, and in preparing and storing oil and other products, is held

¹⁰ See *Mercantile Mut. Ins. Co. v. Folsom*, 18 Wall. 237, 21 L. Ed. 827.

¹¹ But insurance on a ship in the course of construction does not include the materials intended to be incorporated in it. *Mason v. Insurance Co.*, 12 Gill & J. (Md.) 468; *Hood v. Insurance Co.*, 11 N. Y. 532.

¹² *Roddick v. Insurance Co.* [1895] 1 Q. B. 842.

¹³ *Brough v. Whitmore*, 4 Term R. 206.

¹⁴ *Hogarth v. Walker* [1900] 2 Q. B. 283.

not to be covered by a policy upon the ship's "body, tackle, apparel," etc.¹⁵

"Goods and Merchandise."

Under the term "goods and merchandise" are included all articles laden upon the ship for mercantile purposes, but not those on board for other reasons. Therefore these general words do not apply to the clothes of the officers and crew,¹⁶ nor to the provisions intended for consumption on a passenger vessel,¹⁷ nor to bills and notes that are being transported from one country to another.¹⁸ But it seems that coin, precious metals and stones, when transported as merchandise, can be protected under this general expression.¹⁹ Live stock and supplies for feeding them are not covered by insurance upon the vessel's "cargo,"²⁰ it being customary to describe such shipments specifically.

Goods on Deck.

By an exception implied from the usage to stow all goods and merchandise below decks on sea-going vessels, goods stowed on deck are not covered by insurance upon "goods and merchandise laden upon" any vessel,²¹ unless it is expressly stipulated that the goods are to be so carried, or there is a custom to that effect known to the insurer.²²

Freight Money.

The freight covered by the ordinary sea policy is something more than the interest indicated ordinarily by the use of the word "freight." It means, broadly, the benefit which is to accrue to the owner of the vessel, from its use in the voyage contemplated;²³ or, to use Lord

¹⁵ *Gale v. Laurie*, 5 Barn. & C. 156, 164, 11 E. C. L. 187; *Macy v. Insurance Co.*, 135 Mass. 328; *Lewis v. Insurance Co.*, 131 Mass. 364; *Hoskins v. Pickersgill*, 3 Doug. 222, 26 E. C. L. 85; *Taber v. Insurance Co.*, 131 Mass. 239. And see *Phil. Ins.* §§ 496, 497.

¹⁶ *Ross v. Thwaites*, 1 Parker, 23. The same rule would apply to the personal effects of passengers, unless shipped as a part of the cargo. *Wilkinson v. Hyde*, 3 C. B. (N. S.) 30; *Duff v. Mackenzie*, 3 C. B. (N. S.) 16, 91 E. C. L. 16.

¹⁷ *Brown v. Stapylton*, 4 Bing. 122.

¹⁸ *Thomas v. Royal, etc., Assur. Co.*, 1 Price, 195; *Palmer v. Pratt*, 2 Bing. 185, 9 E. C. L. 373.

¹⁹ *American Ins. Co. v. Griswold*, 14 Wend. (N. Y.) 399; *Seton v. Insurance Co.*, 2 Wash. (C. C.) 178, Fed. Cas. No. 12,675; *De Costa v. Firth*, 4 Burr. 1966; *Wolcott v. Insurance Co.*, 4 Pick. (Mass.) 429.

²⁰ *Wolcott v. Insurance Co.*, 4 Pick. (Mass.) 429; *Allegre's Adm'r's v. Insurance Co.*, 2 Gill & J. (Md.) 136, 20 Am. Dec. 424; *Id.*, 8 Gill & J. (Md.) 190, 29 Am. Dec. 536. But if live stock is the usual cargo carried as a trade, and the insurance is made with a view to cover it, it will be included under the head of "cargo." *Chesapeake Ins. Co. v. Allgre's Heirs*, 2 Gill & J. (Md.) 164; *Allegre's Adm'r's v. Insurance Co.*, supra.

²¹ *Backhouse v. Ripley*, 1 Parker, 24; *Ross v. Thwaites*, *Id.* 23.

²² *De Costa v. Edmunds*, 4 Camp. 142.

²³ *Winter v. Haldimand*, 2 Barn. & Adol. 649; *FORBES v. ASPINALL*, 13

Tenterden's expression, "the benefit derived from the use of the ship."²⁴ Therefore the freight money assured to the shipowner may be (1) freight, in its ordinary acceptance, to be earned and payable upon the completion of the voyage; or (2) the hire of the vessel, payable by the charterer; or (3) the benefit accruing to the owner from the use of his vessel in the way of profits upon his own goods carried.²⁵ While freight money is earned only with the completion of the voyage, and then properly payable, it is well settled that advances of freight money are covered by a policy on freight²⁶ issued to a charterer.

Freight will not be considered within the protection of a marine policy unless expressly insured *eo nomine*.

Passage Money.

Passage money, unlike freight, is customarily payable in advance; nor, in the absence of statute, can it be recovered if the vessel is lost before the completion of the passage.²⁷ Under such circumstances the passenger can clearly insure his advances of passage money.²⁸ So, if the passage money becomes payable only upon the completion of the voyage, the shipowner may insure it, as well as freight so payable. But insurance upon freight does not cover passage money.²⁹

Profits.

As already explained,³⁰ inchoate profits of a voyage may be insured in either an open or a valued policy.³¹ In Great Britain it is held, however, that no recovery can be had for profits, on either valued or open policy, unless proof is adduced that some profit would have been earned had the voyage been successfully made.³² In the United

East, 323, 325; *Devaux v. J'Anson*, 5 Bing. N. C. 519, 35 E. C. L. 207; *Flint v. Flemyng*, 1 Barn. & Adol. 45. It includes freight on cargo contracted for or to be shipped on the way, as well as that already on board when the vessel leaves its port. *Stillwell v. Insurance Co.*, 2 Mo. App. 22.

²⁴ *Flint v. Flemyng*, 1 Barn. & Adol. 48.

²⁵ *Flint v. Flemyng*, 1 Barn. & Adol. 48. See also *Devaux v. J'Anson*, 5 Bing. N. C. 519, 35 E. C. L. 207.

²⁶ *Traves v. Worms*, 19 C. B. (N. S.) 177; *Allison v. Insurance Co.*, 1 App. Cas. 209; *Hall v. Janson*, 4 El. & Bl. 509; *Robbins v. Insurance Co.*, 1 Hall, 363.

²⁷ And usually no obligation to return passage money is imposed upon the shipowner or master of a ship by his contract with the passenger. See *Gillan v. Sempkin*, 4 Camp. 241; *Gibson v. Bradford*, 4 El. & Bl. 586, 24 Law J. Q. B. 159.

²⁸ See 1 Arn. Ins. (7th Ed.) § 235.

²⁹ *Denoon v. Insurance Co.*, L. R. 7 Q. P. 341, 41 L. J. C. P. 162.

³⁰ See ante, p. 120.

³¹ *Eyre v. Grover*, 3 Camp. 276, 16 East, 218. No insurable interest in profits of a cargo exists if they have not been contracted for at the time of the loss. *Knox v. Wood*, 1 Camp. 543.

³² *Eyre v. Grover*, 3 Camp. 276, 16 East, 218; *Hodgson v. Same*, 6 East,

States, however, no such proof is required in the case of a valued policy.³³

COMMENCEMENT AND DURATION OF RISK.

211. The beginning of the risk assumed, and its duration, depend altogether upon the agreement of the parties as expressed in the policy, and interpreted in the light of the circumstances and usages with reference to which the contract was made.

In deciding whether a given loss occurred during the currency of the policy under which the plaintiff makes his claim, it is merely necessary for the courts to discover the contractual intentions of the parties to the policy. When a time policy is involved, the questions as to whether the insurance was in force at the time of loss are not ordinarily different from those already considered in connection with fire policies. But the construction of the words used to indicate the commencement and termination of the risk assumed under voyage policies presents some new considerations.

The American form of policy referred to above contains the following language: "Beginning the adventure upon the said goods and merchandise from and immediately following the loading thereof on board of the said vessel at — aforesaid, and so shall continue and endure until the said goods and merchandise shall be safely landed at — aforesaid." The Lloyd's form defines the termination of the voyage for which a ship is insured thus: "Until she hath moored at anchor twenty-four hours in good safety; and upon the goods and merchandises until the same be there discharged and safely landed."

"At and From."

A voyage policy upon a vessel and cargo is generally described as beginning "at and from" one designated port to another, as "at and from New York to Lisbon," such words being written in the policy immediately before the words above quoted from the printed form. A policy running "from" one port to another attaches only at the moment of sailing,³⁴ while a policy "at and from" attaches while the

316. Proof must also be given that the goods were exposed to the dangers of the sea at some time.

³³ It is conclusively presumed that profit would have been realized had the goods arrived safely, and upon this the valuation in the policy attaches. *Patapsco Ins. Co. v. Coulter*, 3 Pet. 222, 7 L. Ed. 659.

³⁴ *Pittegrew v. Pringle*, 3 Barn. & Adol. 514, 23 E. C. L. 136; *Tasker v. Cunningham*, 1 Bligh, 87; *Murray v. Insurance Co.*, 4 Johns. (N. Y.) 443; *Maryland Ins. Co. v. Bossiere*, 9 Gill & J. (Md.) 121. In *Mey v. Insurance Co.*, 3 Brev. (S. C.) 329, a ship was insured from Amsterdam, it being customary for vessels of the insured kind to take on part of their cargo at Amsterdam and the rest at Pexel. The vessel, after being fully laden, was

vessel still lies in the port of departure. The time at which a policy "at and from" attaches to the vessel in the initial port depends upon the conditions under which she is lying there:

(1) If the vessel arrives at the designated port in the course of a voyage, or at that port as a destination, preparatory to beginning from there another voyage, then the policy attaches as soon as she is within the harbor,³⁵ provided she arrives a ship, and not merely a wreck.³⁶ But if the vessel cripples into the harbor in such a condition as not to be able to keep afloat until repairs are made, the policy will not be deemed to have attached. Thus, in *Parmeter v. Cousins*,³⁷ a vessel insured "at and from St. Michaels" arrived at that island in such a leaky condition that she was kept afloat only by continuous pumping. After having lain at anchor more than twenty-four hours, she was blown out to sea and wrecked. It was held, Lord Ellenborough delivering the opinion, that the vessel had never been safely "at" St. Michaels, and that the policy never attached.

(2) But a voyage policy at and from a vessel's home port, in which she has been lying for a considerable time, without reference to the voyage insured, will attach only when preparations for the voyage in question have been actually begun.³⁸

Termination of the Voyage.

Ship and cargo are protected by the insurance from the beginning to the end of the voyage insured, regardless of accidental delays by reason of the vessel's being laid up for repairs or being frozen in,³⁹

lost while lying at Pexel. The insurer was held liable, the vessel having commenced her voyage when she left Amsterdam.

³⁵ *Motteux v. Assurance Co.*, 1 Atk. 545; *Bell v. Bell*, 2 Camp. 475; *Smith v. Surridge*, 4 Esp. 25; *Patrick v. Ludlow*, 3 Johns. Cas. (N. Y.) 10, 2 Am. Dec. 130; *Snyder v. Insurance Co.*, 95 N. Y. 196, 47 Am. Rep. 29; *Seamans v. Loring*, 1 Mason, 127, Fed. Cas. No. 12,583. But see *Vallance v. Dewar*, 1 Camp. 503; *Ougier v. Jennings*, 1 Camp. 505, note. In case a policy is made to commence "at and from" an island, it attaches the moment of the vessel's arrival in any port of the island. *Warre v. Miller*, 4 Barn. & C. 538, 10 E. C. L. 405; *Camden v. Cowley*, 1 W. Bl. 417; *Cruikshank v. Janson*, 2 Taunt. 301.

³⁶ She must be in such a seaworthy condition as to be able to lie in the harbor safely. *St. Paul, etc., Ins. Co. v. Troop*, 26 Can. Sup. Ct. 5. See, also, *PARMETER v. COUSINS*, 2 Camp. 235; *Haughton v. Empire Marine Ins. Co.*, L. R. 1 Exch. 206, 4 Hurl. & C. 41, 12 Jur. N. S. 376. The arrival in safety requisite for the commencement of a risk refers to physical safety only, and not to political safety. *Bell v. Bell*, 2 Camp. 475.

³⁷ 2 Camp. 235; *Richards, Ins. Cas.* 535. But the policy will attach to a damaged vessel immediately upon her arrival at the designated port, if her injuries are not fatal. *Haughton v. Insurance Co.*, L. R. 1 Exch. 206.

³⁸ *Seamans v. Loring*, 1 Mason, 127, Fed. Cas. No. 12,583; *Snyder v. Insurance Co.*, 95 N. Y. 196, 47 Am. Rep. 29; *Taylor v. Lowell*, 3 Mass. 347, 3 Am. Dec. 141; *Kemble v. Bowne*, 1 Caines (N. Y.) 75; *Grant v. King*, 4 Esp. 175. See *Hughes, Admiralty*, p. 69.

³⁹ See *Delahunt v. Insurance Co.*, 97 N. Y. 537.

or, in the case of the cargo, even when it is necessarily transshipped, or taken from the vessel and stored in a warehouse.⁴⁰ Ordinarily it is agreed that the risk shall be terminated after the vessel shall have been moored in the harbor of her destination for twenty-four hours in good safety. The expression "good safety" has reference not only to physical safety, but also to political safety.⁴¹ Thus, where an English vessel was delayed by an embargo laid by the French authorities within twenty-four hours after her arrival, the insurer was held liable for losses sustained by the shipowner.⁴² In order that the vessel shall be moored in good safety physically, it is not necessary that she shall come to her moorings wholly uninjured, but merely that she shall be in such condition as will permit her to discharge her cargo safely and keep afloat until repaired.⁴³ But if she had received her death wound when she came into port, the insurer will be liable even though her death struggle may have lasted longer than twenty-four hours.⁴⁴

WHAT RISKS ARE ASSUMED—PROXIMATE CAUSES OF LOSS.

212. The insurer assumes liability for all losses proximately caused by the perils insured against.
213. **PROXIMATE CAUSE**—When several causes contributed to the loss suffered, that one is deemed to be proximate, within the terms of the rule as stated above, which set in motion the force that, without the intervention of any new and independent agency, brought about the loss complained of.

What risks have been assumed by the insurer is, of course, a question of contract and construction. As enumerated in the customary marine

⁴⁰ *Salisbury v. Insurance Co.*, 23 Mo. 553, 66 Am. Dec. 687. But a delay of twelve days in transportation of goods occasioned by waiting for necessary repairs will not justify their transshipment in another vessel. See, also, *Malinckrodt v. Insurance Co.*, 1 Mo. App. 205.

⁴¹ *Horney v. Lushington*, 15 East, 46, 3 Camp. 85. See *Lockyer v. Offley*, 1 Term R. 252, in which a vessel was taken from its owner, nearly a month after arriving in port, for having smuggled. The insurer was not held liable, as the vessel was said to have been in port twenty-four hours in safety. See, also, *Mariatiqui v. Insurance Co.*, 8 La. 65, 28 Am. Dec. 129.

⁴² See *Minett v. Anderson*, Peake, 211.

⁴³ *Lidgett v. Secretan*, L. R. 5 C. P. 190; *Annen v. Woodman*, 3 Taunt. 299; *Meigs v. Insurance Co.*, 2 Cush. (Mass.) 439; *Dickey v. Insurance Co.*, 11 Johns. (N. Y.) 353. But see *Bill v. Mason*, 6 Mass. 313, in which it was held that, when a ship has been twenty-four hours at the usual place of anchorage, the insurer was relieved from liability, although her cargo could not have been safely landed at any time within the twenty-four hours. It was said that she was "safe," within the meaning of the policy, until she suffered a loss insured against.

⁴⁴ *SHAW v. FELTON*, 2 East, 109.

policy, they are "perils * * * of the seas, men-of-war, fires, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, reprisals, takings at sea, arrests, restraints and detentions of all kings, princes, or people, of what nation, condition, or quality soever, barratry of the master and mariners, and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, or any part thereof."

In accordance with a familiar rule of construction, the general term "all other perils" is confined in its application to perils of a kind similar to those specifically enumerated; that is, to perils of the sea.⁴⁵

To these risks thus generally assumed there are certain exceptions, either expressly stated in the policy under the form of warranties, or implied from the custom of the business. These implied exceptions are also termed "implied warranties," and are to be presently discussed as such.

Proximate Cause of Loss.

The insurer is liable for any loss or injury to the insured venture proximately caused by one of the perils specified, or by a peril of similar kind. The principle determining what is the proximate cause of a loss suffered is ultimately the same in marine insurance as that already discussed as obtaining in connection with fire policies. But the extreme difficulty found sometimes to exist in applying established rules to marine losses renders expedient a brief consideration of the matter in this connection.

It frequently happens that a marine disaster is attributable to the joint action of several causes, some within and some without the terms of the policy. In such cases the liability of the insurer depends upon whether the proximate cause of the loss was a peril assumed or one excepted, and this question is to be decided by properly applying the rule stated in the black-letter text above.⁴⁶ Thus, in the oft-cited case of *Ionides v. Insurance Co.*,⁴⁷ a cargo of coffee was insured

⁴⁵ *De Peau v. Russel*, 1 Brev. (S. C.) 441, 2 Am. Dec. 676; *Moses v. Insurance Co.*, 1 Duer (N. Y.) 159. Lord Bramwell, in *THAMES, & M. INS. CO. v. HAMILTON*, 12 App. Cas. 492, said that the phrase would include "every accidental circumstance, not the result of ordinary wear and tear, delay, or the act of the assured, happening in the course of the navigation of the ship, and incidental to the navigation, and causing loss to the subject-matter of insurance." See, also, *CULLEN v. BUTLER*, 5 Maule & S. 461.

⁴⁶ See *Howard Fire Ins. Co. v. Norwich & N. Y. Transp. Co.*, 12 Wall. 194, 20 L. Ed. 379, in which the rule is thus stated: "When there is no order of succession in time, when there are two concurrent causes of a loss, the predominating, efficient one must be regarded as the proximate, when the damage done by each cannot be distinguished. * * * And certainly that cause which set the other in motion, and gave to it its efficiency for harm at the time of the disaster, must rank as predominant."

⁴⁷ 14 C. B. (N. S.) 259 (108 E. C. L. 259). See *Hughes*, Adm. p. 75, where this and other cases are examined.

"warranted free from all consequences of hostilities," during the American Civil War. The light on Cape Hatteras having been extinguished by the Confederates for military reasons, the captain of the vessel missed his reckoning in rounding that cape, and ran his ship ashore, where the whole ship's company were taken prisoners. A small portion of the coffee was saved by Federal salvors, who could have saved more but for the interference of the Confederate forces. It was held that the proximate cause of the vessel's disaster was running ashore, and not the hostile extinguishing of the light. Therefore the insurer was liable for all of the coffee lost directly through the stranding of the vessel, but not for that part which might have been saved but for the hostile action of the Confederates. As to the latter loss, the hostilities excepted from the operation of the policy were the proximate cause.

If the effects produced by concurrent causes are distinguishable, the loss may be apportioned. Thus, in a leading case,⁴⁸ a steamer was protected by a policy against loss by fire, but not against damage by collision. The steamer came into collision with a schooner, receiving a cut below the water line, which admitted the water rapidly. When the water reached the furnace, steam was formed, which by its explosive force scattered burning coals among inflammable materials. The vessel rapidly burned, and sank in deep water. It was proved that the damage due to the collision alone was not sufficient to have caused the vessel to sink, and might have been repaired for \$15,000. The insurer claimed that the collision was the efficient cause of the loss, as without the collision no fire would have occurred; but the court held that the fire was the efficient cause of the loss of the vessel in her damaged condition, and that the insurer was therefore liable for the whole value of the vessel, less the damage due to the collision.

IMPLIED EXCEPTIONS.

214. There are implied in every insurance upon any marine venture, whether of vessel, cargo, or freight, three conditions of exception to the underwriter's liability for the risks assumed, usually termed "implied warranties." That is, the insurer will not be liable for any loss under his policy in case the vessel (1) is unseaworthy at the inception of the insurance, or (2) deviates from the agreed voyage, or (3) engages in an illegal venture. In England the warranty of seaworthiness is not implied in the case of time policies.
215. SEAWORTHINESS—A vessel is seaworthy when she is sufficiently strong and tight to resist the perils reasonably incident to the

⁴⁸ Howard Fire Ins. Co. v. Norwich & N. Y. Transp. Co., 12 Wall. 194, 20 L. Ed. 379. See, also, the interesting case of Brown v. Insurance Co., 61 N. Y. 332, Richards, Ins. Cas. 549.

voyage for which she is insured, and is properly manned and equipped for such a voyage.⁴⁹

216. DEVIATION from the agreed voyage exists whenever the vessel unnecessarily departs from the course fixed by express agreement, maritime custom, or, in the absence of either of these, by the discretion of a reasonably careful and skillful navigator; or when the vessel unreasonably delays in pursuing such course.
217. ILLEGALITY—Insurance upon any venture contemplating the violation of law is, like any other contract to the same effect, void. This rule, it seems, does not apply to ventures in violation of foreign revenue laws.

In General.

It is ordinarily said that every one insuring a sea venture impliedly warrants that the vessel is seaworthy,⁵⁰ that there will be no unnecessary deviation from the prescribed voyage, and that the venture shall be legal; and that these warranties are as much terms of the contract as if expressly written on the face of the policy. The last, however, is certainly not a "warranty," in any proper sense of the word; for, if the contemplated illegality of the voyage is known to both insurer and insured, the contract insuring it is necessarily void, in accordance with an elementary rule of the law of contracts; whereas, if the illegality is known only to the insured, his concealment of so material a fact will per se avoid the insurance. So, while the rule as to seaworthiness is properly considered a warranty in connection with voyage policies, it is a mere condition of exception to the risks assumed by the insurer in connection with time policies, as interpreted by the American decisions.

Warranty of Seaworthiness—Voyage Policies.

It is well settled on both sides of the Atlantic that a voyage policy, whether on ship or cargo, never attaches unless, at the beginning of the voyage insured, the vessel leaves port in a seaworthy condition.⁵¹ It is now equally certain that this warranty applies to the beginning of the voyage only, and does not extend through the whole period of its prosecution.⁵² While the willful misconduct of the insured in in-

⁴⁹ Adapted from Hughes, Adm. p. 56.

⁵⁰ The implied warranty of seaworthiness is not excluded by the fact that "loss from unseaworthiness" is enumerated among the risks insured against. Quebec Marine Ins. Co. v. Commercial Bank, L. R. 3 P. C. 234.

⁵¹ Higgle v. American Lloyds (D. C.) 14 Fed. 143, 11 Biss. 395; Seaman v. Insurance Co. (C. C.) 21 Fed. 778; Taylor v. Lowell, 3 Mass. 331, 3 Am. Dec. 141; Van Wickle v. Insurance Co., 97 N. Y. 350; Hellner v. Insurance Co., 60 N. Y. Super. Ct. 362, 18 N. Y. Supp. 177; Merchants' Ins. Co. v. Morrison, 62 Ill. 242, 14 Am. Rep. 93; Wedderburn v. Bell, 1 Camp. 1; Knill v. Hooper, 2 H. & N. 277; Lemelin v. Assurance Co., 1 Quebec, 337.

⁵² Bermon v. Woodbridge, 2 Doug. 788; Copeland v. Insurance Co., 2 Metc.

tentionally rendering his vessel unfit to encounter the perils of the voyage will discharge the insurer, the fact that a vessel became unseaworthy after leaving port, even though her unseaworthiness was due to the negligence or unskillfulness of the officers and crew, will not defeat the insurance.⁵³

Same—Time Policies.

It is now settled in England that there arises no implied warranty of seaworthiness in the case of time policies,⁵⁴ but that the insurer must rely merely upon the self-interest and good faith of the insured to keep his vessel in as good a condition as is possible during the insured period.⁵⁵ In America, however, the greatest confusion prevails in regard to the extent of the insured's duty to keep his vessel seaworthy during the currency of a time policy. Some states have adopted the English rule,⁵⁶ while one, at least, has declared that the same rule is applicable to time policies as to voyage policies.⁵⁷ The general tendency of authority in this country, however, is to establish this rule: If at the time of the beginning of the risk the vessel is in her home port, or in any other port in which she might be refitted, she must be seaworthy when she sails,⁵⁸ but, if the policy attaches while the vessel is at sea, seaworthiness is not warranted.⁵⁹ After the policy has once properly attached, it becomes the duty of the insured or his representatives to use ordinary diligence and skill in keeping the vessel in a seaworthy condition, refitting her as opportunity offers and necessity re-

(Mass.) 432; *American Ins. Co. v. Ogden*, 20 Wend. (N. Y.) 287; *Lockwood v. Insurance Co.*, 46 Mo. 71.

⁵³ See excellent opinion of Parke, B., in *DIXON v. SADLER*, 5 Mees. & W. 405, Richards, Ins. Cas. 415. See, also, *Cross v. Insurance Co.*, 22 L. C. Jur. 10.

⁵⁴ *GIBSON v. SMALL*, 4 H. L. Cas. 353, 17 Jur. 1131; *Dudgeon v. Pembroke*, 2 App. Cas. 284; *Hollingworth v. Brodrick*, 7 Ad. & El. 4, 34 E. C. L. 28; *Stewart v. Wilson*, 12 Mees. & W. 11; *Fawcus v. Sarsfield*, 6 El. & Bl. 192, 88 E. C. L. 192; *Anchor Mar. Ins. Co. v. Keith*, 9 Can. Sup. Ct. 483; *Phoenix Ins. Co. v. Anchor Ins. Co.*, 4 Ont. 524.

⁵⁵ But if a ship insured under a time policy is knowingly sent to sea in an unseaworthy state, and is lost, the assured cannot recover. All that is necessary to establish is that the unseaworthiness was so connected with the loss that it must necessarily have led thereto. It need not be the proximate and immediate cause of the loss. *Thompson v. Hopper*, 6 El. & Bl. 192, 88 E. C. L. 192.

⁵⁶ *Merchants' Ins. Co. v. Morrison*, 62 Ill. 242, 14 Am. Rep. 93.

⁵⁷ *Hoxie v. Insurance Co.*, 32 Conn. 21, 85 Am. Dec. 240.

⁵⁸ *HOXIE v. INSURANCE CO.*, 7 Allen (Mass.) 211; *Union Ins. Co. v. Smith*, 124 U. S. 405, 8 Sup. Ct. 534, 31 L. Ed. 497; *Jones v. Insurance Co.*, 2 Wall. Jr. (U. S.) 278, Fed. Cas. No. 7,470; *Rouse v. Insurance Co.*, 3 Wall. Jr. (U. S.) 367, Fed. Cas. No. 12,089.

⁵⁹ *Macy v. Insurance Co.*, 12 Gray (Mass.) 497; *Capen v. Insurance Co.*, 12 Cush. (Mass.) 517; *Hathaway v. Insurance Co.*, 21 N. Y. Super. Ct. 33.

quires; but the failure of the insured to perform his obligation in this respect does not release the insurer from liability for a loss suffered unless that loss was due to the default of the insured.⁶⁰

What Constitutes Seaworthiness.

There are to be found in the books many definitions of seaworthiness, but they all amount to the ultimate requirement that the vessel, at the time of sailing, shall in all respects be reasonably fit to make in safety the voyage contemplated.⁶¹ What is reasonable fitness to encounter the perils expected to arise in the course of a voyage vary, naturally, with the character of the voyage. A vessel well fitted for the navigation of the Mississippi would be wholly unfit for a voyage on the Great Lakes, while a lake steamer would scarcely be seaworthy in the Atlantic. A crew that would be quite adequate for a vessel while passing through a canal might be insufficient for the proper handling of the same vessel on the high seas.

Not only must the vessel be staunch and tight in hull, complete in rigging,⁶² machinery and equipment,⁶³ and properly manned,⁶⁴ furnished and provisioned,⁶⁵ but the cargo must also be properly stowed,⁶⁶ and not greater than the safe carrying capacity of the ship.⁶⁷ Of course, however, it is not necessary that the cargo itself shall be seaworthy.⁶⁸

It stands to reason that the warranty of seaworthiness is not an ab-

⁶⁰ See *Union Ins. Co. v. Smith*, 124 U. S. 405, 8 Sup. Ct. 534, 31 L. Ed. 497.
⁶¹ *Moore v. Louisville Underwriters (C. C.)* 14 Fed. 226; *Cobb v. Insurance Co.*, 6 Gray (Mass.) 192; *Knill v. Hooper*, 2 Hurl. & N. 277; *Annen v. Woodman*, 3 Taunt. 299.

⁶² *The Orient (C. C.)* 16 Fed. 916; *Bullard v. Insurance Co.*, 1 Curt. (U. S.) 148, Fed. Cas. No. 2,122; *Myers v. Insurance Co.*, 26 Pa. 192; *Merchants' Ins. Co. v. Morrison*, 62 Ill. 242, 14 Am. Rep. 93; *Wedderburn v. Bell*, 1 Camp. 1.

⁶³ *Wedderburn v. Bell*, 1 Camp. 1, in which it was held that the vessel must be supplied with sufficient sails, not only to endure the common perils, but to enable her to escape an enemy by keeping her speed.

⁶⁴ *Merchants' Ins. Co. v. Morrison*, 62 Ill. 242, 14 Am. Rep. 93; *Quebec Mar. Ins. Co. v. Commercial Bank*, L. R. 3 P. C. 234; *Myers v. Insurance Co.*, 26 Pa. 192.

⁶⁵ *Tait v. Levi*, 14 East, 481; *Treadwell v. Insurance Co.*, 6 Cow. (N. Y.) 270; *Copeland v. Insurance Co.*, 2 Metc. (Mass.) 446; *Rogers v. Insurance Co. (D. C.)* 76 Fed. 569; *Wedderburn v. Bell*, 1 Camp. 1; *Woolf v. Claggett*, 3 Esp. 258; *Stewart v. Wilson*, 12 Mees. & W. 11; *Fontaine v. Insurance Co.*, 10 Johns. (N. Y.) 58.

⁶⁶ *Chase v. Insurance Co.*, 5 Pick. (Mass.) 51.

⁶⁷ *Cincinnati Mut. Ins. Co. v. May*, 20 Ohio, 211; *Anderson Lumber Co. v. Greenwich Ins. Co. (D. C.)* 79 Fed. 125.

⁶⁸ *Koebel v. Saunders*, 17 C. B. (N. S.) 71, 112 E. C. L. 71, 10 Jur. N. S. 920. But in every policy on the cargo there is an implied warranty that the ship shall be seaworthy. *Van Wickie v. Insurance Co.*, 97 N. Y. 350; *Higgle v. American Lloyds (D. C.)* 14 Fed. 143; *Knill v. Hooper*, 2 Hurl. & N. 277.

solute guaranty that the vessel will safely meet all possible perils. Neither is it a mere warranty of due diligence on the part of the insured in endeavoring to make her seaworthy. The vessel must actually be seaworthy at the time of sailing. Thus, where a vessel set out upon the voyage in which she was wrecked, with a defective compass, it was held that the vessel was unseaworthy, and the insurer discharged, despite the master's ignorance of the defect in the compass.⁶⁹

Deviation.

Just as a surety is discharged if the creditor materially changes the contract with the principal debtor, irrespective of actual injury to the surety, so the marine underwriter is entitled to be discharged if the risk assumed is changed by a deviation from the voyage insured. And the fact that the deviation did not increase the risk, or in any wise contribute to the loss suffered, is wholly immaterial. This principle is strikingly illustrated by the leading case of *Burgess v. Insurance Co.*⁷⁰ A fishing vessel was insured from Plymouth for a fishing voyage to the Banks of Newfoundland. In former seasons she had secured a supply of bait on the Banks, but on this voyage no bait could be obtained there. Under these circumstances she was compelled to sail to a nearby port, St. Peter's, to procure the bait necessary to the accomplishment of the purpose of her voyage. After an absence of less than a week she returned to the Banks and resumed fishing. Several days later a severe storm arose, in which the vessel foundered. The court held that the voyage to St. Peter's was a deviation which discharged the insurer, although it did not in any respect contribute to the loss.

The voyage may be expressly prescribed by naming the terminal and intermediate ports, or only the terminal ports may be named, when the vessel must pursue the customary course between such ports,⁷¹ or, if they chance to be little frequented ports, between which no customary course has been established, the master must follow that route which to an ordinarily skillful mariner would appear most direct and proper.⁷²

The insurer is also entitled to expect the voyage to be prosecuted with all reasonable dispatch, to have his risk discharged as soon as is

⁶⁹ *Richelieu & O. Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 10 Sup. Ct. 934, 34 L. Ed. 398.

⁷⁰ *BURGESS v. INSURANCE CO.*, 126 Mass. 70, 30 Am. Rep. 654, Richards, Ins. Cas. 420. See, also, *Snyder v. Insurance Co.*, 95 N. Y. 196, 47 Am. Rep. 29; *Martin v. Insurance Co.*, 2 Wash. C. C. (U. S.) 254, Fed. Cas. No. 9,161; *KETTELL v. WIGGIN*, 13 Mass. 68; *Natchez Ins. Co. v. Stanton*, 2 Smedes & M. (Miss.) 340, 41 Am. Dec. 592.

⁷¹ *Commonwealth Ins. Co. v. Cropper*, 21 Md. 311.

⁷² *Hearne v. Insurance Co.*, 20 Wall. 488, 22 L. Ed. 395.

reasonably possible.⁷³ Therefore, any unreasonable delay in the course of the voyage will be considered a deviation and avoid the insurance.⁷⁴

Necessary Deviation not a Breach of Warranty.

The warranty against deviation refers only to voluntary deviation. If the vessel is driven out of her course by a storm,⁷⁵ or departs from it to escape capture,⁷⁶ or to avoid any imminent peril,⁷⁷ or to secure necessary repairs,⁷⁸ the insurance is not affected. Such compulsory deviations are risks impliedly assumed by the underwriter. A deviation for the purpose of saving life does not constitute a breach of warranty,⁷⁹ but a deviation in order to save property is not so justified.⁸⁰

Illegality.

The only peculiarity about insurances of illegal sea ventures that requires our attention is the doctrine as to foreign revenue laws. A policy upon a vessel known to be engaged in violating the revenue laws of the country to which the parties owe allegiance, or before whose courts the question may come, is undoubtedly void. But in England, at least, it is settled law that English courts will not aid in enforcing

⁷³ *Arnold v. Insurance Co.*, 78 N. Y. 7, 8 Ins. Law J. 869; *Himely v. Insurance Co.*, 1 Mill. Const. (S. C.) 154, 12 Am. Dec. 623; *Coffin v. Insurance Co.*, 9 Mass. 436; *Mount v. Larkins*, 8 Bing. 108, 21 E. C. L. 241. In *Augusta Ins. & Banking Co. v. Abbott*, 12 Md. 348, it was held that the detention of the ship in port by proceedings instituted in the Circuit Court of the United States for the recovery of a debt due for repairs was no excuse for delay, and the insurer was relieved from liability.

⁷⁴ *Oliver v. Insurance Co.*, 7 Cranch (U. S.) 487, 3 L. Ed. 414; *BURGESS v. INSURANCE CO.*, 126 Mass. 70, 30 Am. Rep. 654; *AMSINCK v. INSURANCE CO.*, 129 Mass. 185, 9 Ins. Law J. 581; *Andenreid v. Insurance Co.*, 60 N. Y. 482, 19 Am. Rep. 204.

⁷⁵ *BURGESS v. INSURANCE CO.*, 126 Mass. 70, 30 Am. Rep. 654; *Graham v. Insurance Co.*, 11 Johns. (N. Y.) 352.

⁷⁶ *Whitney v. Haven*, 13 Mass. 172; *Reade v. Insurance Co.*, 3 Johns. (N. Y.) 352, 3 Am. Dec. 495; *Patrick v. Ludlow*, 3 Johns. Cas. (N. Y.) 10, 2 Am. Dec. 130; *O'Reilly v. Gonne*, 4 Camp. 249.

⁷⁷ *Reade v. Insurance Co.*, 3 Johns. (N. Y.) 352, 3 Am. Dec. 495; *Byrne v. Insurance Co.*, 7 Mart. (N. S., La.) 126; *Riggin v. Insurance Co.*, 7 Har. & J. (Md.) 279, 16 Am. Dec. 302.

⁷⁸ *Hall v. Insurance Co.*, 9 Pick. (Mass.) 466; *Turner v. Insurance Co.*, 25 Me. 515, 43 Am. Dec. 294; *Miller v. Russell*, 1 Bay (S. C.) 309.

⁷⁹ *Bond v. The Brig Cora*, 2 Wash. C. C. (U. S.) 80, Fed. Cas. No. 1,621; *The Schooner Boston*, 1 Sumn. (U. S.) 328, Fed. Cas. No. 1,673; *Dabney v. Insurance Co.*, 14 Allen (Mass.) 300; *Fernandez v. Insurance Co.*, 48 N. Y. 571, 8 Am. Rep. 571.

⁸⁰ *Mason v. The Blaireau*, 2 Cranch, 240, 2 L. Ed. 266; *Settle v. Insurance Co.*, 7 Mo. 379; *Dabney v. Insurance Co.*, 14 Allen (Mass.) 300. If the paramount consideration for the deviation is the desire to save life, and the saving of property is merely incidental thereto, it is otherwise. *Williams v. Box of Bullion*, 1 Spr. (U. S.) 57, Fed. Cas. No. 17,717; *Crocker v. Jackson*, 1 Spr. (U. S.) 141, Fed. Cas. No. 3,398; *Scaramauga v. Stamp*, 5 C. P. Div. 295.

foreign revenue laws by declaring void insurances upon ventures contemplating the violation of such laws.⁸¹ And such is generally thought to be the law in this country,⁸² although a recent writer of high authority expresses the opinion that the Supreme Court of the United States, when called upon to decide the question, may repudiate the English rule.⁸³

PERILS OF THE SEA.

218. The phrase "perils of the sea" includes only those casualties due to the unusual violence or extraordinary action of wind and wave, or to other extraordinary causes connected with navigation. It does not include losses resulting from ordinary wear and tear, or other damage usually incident to the voyage.

A ship, like any other mechanical contrivance, suffers a certain amount of damage in being used for ordinary purposes and under ordinary conditions. Rigging will chafe and weaken and break; sails, exposed to the weather, will split and be carried away; machinery will break or gradually wear out; and a wooden hull will weaken from decay or through the ravages of worms.⁸⁴ Such damage is termed "ordinary wear and tear," for which the insurer assumes no liability.⁸⁵ The perils of the seas which he expresses himself content to bear are those which do not ordinarily occur, but are fortuitous and unusual.⁸⁶ The mere fact that an injury is due to the violence of some marine force does not necessarily bring it within the protection of the policy if such violence was not unusual or unexpected.⁸⁷ Thus, the insurer

⁸¹ *Lever v. Fletcher, Parker, Mar. Ins.* (8th Ed.) p. 506; *PLANCHÉ v. FLETCHER*, 1 Doug. 251.

⁸² *Livingston v. Insurance Co.*, 7 Cranch, 506, 3 L. Ed. 421; *Parker v. Jones*, 13 Mass. 173; *Skidmore v. Desdouty*, 2 Johns. Cas. (N. Y.) 77; *Decrow v. Insurance Co.*, 43 Me. 460.

⁸³ See *Hughes, Adm.* p. 66, citing the analogous case of *Oscanyan v. Arms Co.*, 103 U. S. 261, 26 L. Ed. 539.

⁸⁴ *Hazard v. Insurance Co.*, 8 Pet. 557, 8 L. Ed. 1043; *Martin v. Insurance Co.*, 2 Mass. 420; *ROHL v. PARR*, 1 Esp. 445.

⁸⁵ *Paterson v. Harris*, 1 Best & S. 336, 101 E. C. L. 336; *Bullard v. Insurance Co.*, 1 Curt. (U. S.) 148, Fed. Cas. No. 2,122; *The Guinare (C. C.)* 42 Fed. 861; *HUNTER v. POTTS*, 4 Camp. 203; *THAMES & M. INS. CO. v. HAMILTON*, 12 App. Cas. 492; *THOMPSON v. WHITMORE*, 3 Taunt. 227.

⁸⁶ "Perils of the sea," is defined by Judge Lush in *Merchants' Trading Co. v. Universal Marine Co.*, cited by Blackburn, J., in *Dudgeon v. Pambroke*, L. R. 9 Q. B. 596, as those "casualties arising from the violent action of the elements, as distinguished from silent, natural, gradual action of the elements upon the vessel itself, which latter properly belong to wear and tear." See, also, *Howell v. Insurance Co.*, 7 Ohio, 276, pt. 1.

⁸⁷ *Coles v. Insurance Co.*, 3 Wash. C. C. (U. S.) 159, Fed. Cas. No. 2,988; *Neidlinger v. Insurance Co. (C. C.)* 11 Fed. 514; *Baker v. Insurance Co.*, 12 Gray (Mass.) 603. An insurance company is not liable on a policy on pas-

is not liable for a sail carried away by the violence of a tempest, for tempests are not unusual, nor is the loss of a sail. But the carrying away of a mast, or the loss of an anchor, by a storm, will entail liability upon the insurer, for such damage is due only to unusual violence in the elements, and is not ordinarily to be expected as incident to navigation. So, it was held in a leading case⁸⁸ that damage resulting to a vessel's hull from taking the ground at ebb tide, as was customary for all vessels visiting that harbor, and as the insured vessel intended to do, was not due to a peril of the sea, but chargeable to mere wear and tear. But when, in making a landing on a river bank, a steamer accidentally struck the river bank with such violence as to cause her to sink, the insurer was held liable for the loss.⁸⁹ Likewise it has been held that, when a vessel rolled in a storm so violently as to throw cattle carried between decks together with such force that they were killed, the loss was chargeable to the insurer as resulting from a peril of the seas.⁹⁰

But a peril of the seas must be connected with navigation, maritime in character. The mere fact that a loss is due to an accident aboard ship does not necessarily bring it within the phrase "perils of the sea." Thus, in a leading case before the House of Lords,⁹¹ the insured sought to hold the underwriter responsible for damage accidentally done to the ship's pumping machinery while engaged in filling the boilers of the ship, which was then lying at anchor and preparing for a voyage. It was held by the House of Lords, reversing the lower court, that such damage, though unusual and accidental, had nothing to do with the sea, nor was it peculiar to a ship as such. Therefore, it was not such a peril of the seas as the insurer had agreed to bear.

BARRATRY.

219. Barratry is any willful misconduct on the part of master or crew, in pursuance of some unlawful or fraudulent purpose, without the consent of the owners, and to the prejudice of the owner's interest.⁹²

sage money that had to be refunded because of a delay occasioned by "perils of the sea." *Howard v. Insurance Co.*, 18 N. Y. Super. Ct. 38.

⁸⁸ *MAGNUS v. BUTTEMER*, 11 C. B. 876.

⁸⁹ *Seaman v. Insurance Co. (C. C.)* 21 Fed. 778.

⁹⁰ *Lawrence v. Aberdeen*, 5 Barn. & Ald. 107, 7 E. C. L. 38. See, also, *Coit v. Smith*, 3 Johns. Cas. (N. Y.) 16; *Snowden v. Guion*, 101 N. Y. 458, 5 N. E. 322, affirming 50 N. Y. Super. Ct. 137. In *Gabay v. Lloyd*, 3 Barn. & C. 793, 10 E. C. L. 229, the insurers were held liable though the cattle died from wounds inflicted by their kicking one another.

⁹¹ *THAMES & M. MARINE INS. CO. v. HAMILTON*, L. R. 12 App. Cas. 484, *Richards, Ins. Cas.* 543.

⁹² See Justice Story's definition in *Marcadier v. Insurance Co.*, 8 Cranch, 39, 3 L. Ed. 481, approved in *Hughes, Adm.* p. 72.

Barratry is a common-law crime, and therefore necessarily requires a willful and intentional act in its commission.⁹³ No honest error of judgment or mere negligence, unless criminally gross, can be barratry.⁹⁴ An essential element of barratry is that it shall be prejudicial to the owner of the vessel.⁹⁵ If the owner colludes with the master in doing the fraudulent or unlawful act, the act done may or may not be criminal, but it cannot be barratrous.⁹⁶ It follows from this principle that a master who is also owner cannot commit barratry.⁹⁷ But if the master is only part owner, he may commit barratry against his absent co-owners.⁹⁸

Barratrous acts must be injurious to the owners, but they need not be so intended.⁹⁹ Thus, the master may violate port or revenue laws, thinking thus to benefit the owners; but, since such illegal acts subject the vessel to arrest or to the payment of penalties, it is clear that they are really injurious to the owner, and barratrous.¹⁰⁰

Willful acts in fraud of the owners constitute barratry; as selling or running away with the ship,¹⁰¹ or burning or scuttling her.¹⁰² So, unlawfully selling the cargo,¹⁰³ or making way with the proceeds,¹⁰⁴ or even willfully stowing the cargo on deck when instructed to stow under deck,¹⁰⁵ amounts to barratry.

⁹³ *Dederer v. Insurance Co.*, 2 Wash. C. C. 61, Fed. Cas. No. 3,733; *Todd v. Ritchie*, 1 Starkie, 240; *Messonier v. Insurance Co.*, 1 Nott. & McC. (S. C.) 155.

⁹⁴ See cases cited in note next above, and *Atkinson v. Insurance Co.*, 65 N. Y. 531; *Wiggin v. Amory*, 14 Mass. 1, 7 Am. Dec. 175; *Stewart v. Insurance Co.*, 1 Humph. (Tenn.) 242.

⁹⁵ *Wiggin v. Amory*, 14 Mass. 1, 7 Am. Dec. 175; *Patapsco Ins. Co. v. Coulter*, 3 Pet. 222, 7 L. Ed. 659; *Stamma v. Brown*, 2 Strange, 1173.

⁹⁶ *Nutt v. Bourdieu*, 1 Term R. 323; *Stamma v. Brown*, 2 Strange, 1173; *Thurston v. Insurance Co.*, 3 Calnes (N. Y.) 89; *Ward v. Wood*, 13 Mass. 539.

⁹⁷ *Marcardler v. Insurance Co.*, 8 Cranch, 39, 3 L. Ed. 481.

⁹⁸ *Willson v. Insurance Co.*, 12 Cush. (Mass.) 360, 59 Am. Dec. 188; *Jones v. Nicholson*, 10 Exch. 28.

⁹⁹ *Voisin v. Insurance Co.*, 62 Hun, 4, 16 N. Y. Supp. 410; *Earle v. Rowcroft*, 8 East, 126.

¹⁰⁰ *Earle v. Rowcroft*, supra; *Phoenix Ins. Co. v. Moog*, 78 Ala. 234, 56 Am. Rep. 31; *Wilcocks v. Insurance Co.*, 2 Bin. (Pa.) 579, 4 Am. Dec. 480.

¹⁰¹ *Dixon v. Reed*, 5 Barn. & Ald. 597, 7 E. C. L. 201.

¹⁰² *Phoenix Ins. Co. v. Moog*, 78 Ala. 234, 56 Am. Rep. 31.

¹⁰³ *Meyer v. Insurance Co.*, 104 Cal. 382, 38 Pac. 82; *New Orleans Ins. Co. v. Albro Co.*, 112 U. S. 508, 5 Sup. Ct. 289, 28 L. Ed. 809.

¹⁰⁴ *Falkner v. Ritchie*, 2 Maule & S. 290; *Brown v. Smith*, 1 Dow, 349.

¹⁰⁵ *Atkinson v. Insurance Co.*, 65 N. Y. 531.

THEFTS.

220. The word "thieves" in the marine policy is held by the English courts to apply only to persons outside of the vessel, who by the exercise of force break into the vessel and rob her. But the American authorities include theft by members of the crew or by passengers.

The word "thieves" in the marine policy, being associated with "enemies, pirates, rovers," against whose violent acts the insurer covenants to insure, is held by the English authorities to mean those persons, not of the ship's company, nor yet pirates or rovers, who by the exercise of force rob the vessel.¹⁰⁶ In the view of these authorities the underwriter does not intend to assume liability for mere thefts by passengers or crew, against which the master may protect the property in his charge by the exercise of a proper degree of diligence. Further, the wrongful appropriation of any part of the ship's furniture or cargo by one of the crew would be barratry, for which the insurer expressly agrees to be liable.

In America, however, it seems that thefts of any sort, whether by persons belonging to the ship's company or by strangers, are included within the meaning of the word as used in sea policies.¹⁰⁷

CAPTURES, ARRESTS, RESTRAINTS.

221 The terms "takings at sea, arrests, restraints, and detainments of all kings, princes, and people," refer only to extraordinary acts done by virtue of any sovereign authority in times of war, or under other unusual international conditions. They do not include acts done in the course of regular legal proceedings.

War has always been peculiarly disastrous to shipping, not only to that of the belligerent powers, which is liable to capture whenever overhauled by an enemy, but also to that of neutrals, which is subject to constant interference, and even capture, under the rules of international law in reference to blockades and contraband traffic. It is against such perils that the shipowner seeks protection under the terms of the marine policy as above quoted. Even strained international relations may cause arrest and detention of vessels under embargoes, thus

¹⁰⁶ *Harford v. Maynard*, 1 Park. Ins. 36. See *Taylor v. Liverpool, etc., Co.*, L. R. 9 Q. B. 546. This case, however, involved a bill of lading. But see *Steinman v. Angier Line* [1891] 1 Q. B. 619.

¹⁰⁷ See *Spinetti v. Steamship Co.*, 80 N. Y. 71, 36 Am. Rep. 579, and 1 Parsons, Mar. Ins. pp. 563-566. See, also, *ATLANTIC INS. CO. v. STORROWS*, 5 Paige (N. Y.) 285; *American Ins. Co. v. Bryan*, 26 Wend. (N. Y.) 563, 37 Am. Dec. 278.

causing great loss to the owners.¹⁰⁸ Such losses are all fortuitous in character, and may properly be indemnified by the underwriter, who, however, frequently inserts in his policy express exceptions against war risks of every kind.

Under these terms the insurer is not liable for the consequences of arrests and detentions that may occur by virtue of legal process, or by the operation of ordinary laws.

This principle is well illustrated by a recent English case.¹⁰⁹ A cargo of cattle from Liverpool to Buenos Ayres was insured against the usual risks, including "arrests, restraints, and detentions by kings, princes, and people." Upon arrival at Buenos Ayres it was discovered that the cattle were afflicted with a disease which, under the laws of the Argentine Republic, prohibited their being admitted into that port. Not being allowed to land, the cattle were transshipped into lighters, and ultimately sold at considerable loss at another port. The owners claimed that this loss was due to restraint imposed upon their venture by the people of the Argentine Republic, but the court held that the insurer was not liable under the policy, such a restraint as was suffered in this case being merely due to the operation of ordinary municipal regulations.

In another English case, certain shipments of gold that had been likewise insured against arrests and seizures were seized by the order of the Transvaal government a few days before the outbreak of hostilities between Great Britain and that Republic. It was held in this case that the seizure was within the meaning of the policy, and the insurer was therefore liable.¹¹⁰ In a second case, arising under almost similar facts, the insurer of gold seized by the Transvaal government was held exempted from liability by a clause of the policy which warranted the subject of the insurance free from "capture, seizure, and detention."¹¹¹

These seizures were due to extraordinary international conditions, and fortuitous. But a vessel that does not pay her debts may expect to be libeled and detained. There is nothing fortuitous or unexpected about such an arrest.¹¹² The captures, arrests, and restraints insured against are acts of state, as opposed to the unauthorized depredations of "pirates, rovers, and thieves."

While the title of the owner of captured property is not completely

¹⁰⁸ *Walden v. Insurance Co.*, 5 Johns. (N. Y.) 310, 4 Am. Dec. 359.

¹⁰⁹ *Miller v. Insurance Soc.*, 71 Law J. K. B. 551, [1902] 2 K. B. 694, 50 Wkly. Rep. 474.

¹¹⁰ *Janson v. Consolidated Mines*, 71 Law J. K. B. 857, [1902] App. Cas. 484, 87 Law T. 372, 51 Wkly. Rep. 142.

¹¹¹ *Robinson Gold Min. Co. v. Alliance, etc., Assur. Co.*, 71 Law J. K. B. 942, [1902] 2 K. B. 489, 86 Law T. 858, 51 Wkly. Rep. 105.

¹¹² *Finlay v. Liverpool, etc., Co.*, 23 L. T. (N. S.) 251.

divested until sentence of condemnation by a prize court, the insured owner need not await such proceedings, but may abandon the captured property to the underwriter as a total loss. The owner of a vessel arrested under an embargo has the same privilege of abandonment. If the underwriter declines to accept the abandonment, the insured can successfully prosecute an action against him as for a total loss, unless, perchance, the vessel is released before judgment. The same is true of captured property.

JETTISON.

222. Jettison is the intentional casting overboard of any part of a venture exposed to peril, whether it be of the cargo, or of the ship's furniture or tackle, in the hope of saving the rest of the venture.

In cases of emergency it sometimes becomes necessary to lighten a vessel by throwing a part of the cargo overboard, or to relieve strains upon her by cutting away masts, rigging, or sails. Such losses, known as "jettisons," are properly to be attributed to perils of the seas, even though they are immediately caused by the intentional acts of the crew, and are therefore to be made good by the insurer.¹¹³ But the insurer paying such a loss is subrogated to the insured's claim of general average against that part of the venture saved.¹¹⁴

While jettison is ordinarily a sacrifice of a part of a venture imperilled to save the remainder, it need not always be so. Thus, it has been held that the value of certain coin thrown overboard in order to avoid its capture by an enemy close at hand was a jettison for which the insurer was liable.¹¹⁵

PARTICULAR AND GENERAL AVERAGE LOSSES.

223. PARTICULAR AVERAGE losses are merely those losses suffered by and borne alone by particular interests in a venture, being usually partial losses.

224. GENERAL AVERAGE losses are those due to the voluntary and intentional sacrifice of a part of a venture for the purpose of saving the rest of the venture from imminent peril. A general average loss must be borne equally by all of the interests concerned in the venture.

¹¹³ *Dickenson v. Jardine*, L. R. 3 C. P. 639; *Merchants' & Manufacturers' Ins. Co. v. Shillito*, 15 Ohio St. 559, 86 Am. Dec. 491; *Wood v. Insurance Co.* (C. C.) 8 Fed. 27; *Hazleton v. Insurance Co.* (D. C.) 12 Fed. 159.

¹¹⁴ *Hazleton v. Insurance Co.* (D. C.) 12 Fed. 159.

¹¹⁵ *Butler v. Wildman*, 3 Barn. & Ald. 398.

The doctrine of general average contribution in cases of marine disaster belongs properly to admiralty law, and the reader must refer to works on admiralty for a discussion of its origin, development, and particular rules.¹¹⁶ Its striking analogy to insurance, and the frequency with which its rules are involved in adjusting insurance payments, require that it shall be briefly explained here.

Particular Average.

The term "particular average" is applied to those losses which occur under such circumstances as do not entitle the unfortunate owners to receive contribution from other owners concerned in the same venture; as, where a vessel is accidentally run aground and goes to pieces after the cargo is saved. Such a loss is particular average, and must be borne by the owner of the vessel alone. The term "particular average" is used in the memorandum clause of the marine policy in the sense of partial loss.

General Average.

General average is a principle of customary law, independent of contract, whereby, when it is decided by the master of a vessel, acting for all the interests concerned, to sacrifice any part of a venture exposed to a common and imminent peril in order to save the rest, the interests so saved are compelled to contribute ratably to the owner of the interest sacrificed, so that the cost of the sacrifice shall fall equally upon all.¹¹⁷ A recent writer on admiralty thus admirably summarizes the requisites to the right to claim general average contribution:¹¹⁸ "The sacrifice (a) must be voluntary, and for the benefit of all; (b) must be made by the master or by his authority; (c) must not be caused by any fault of the party asking the contribution; (d) must be successful; (e) must be necessary."

The most frequent causes of general average loss are putting into port for repairs to the vessel or the rehandling of the cargo, and jet-tisons.¹¹⁹

Stranding.

In England it is held that voluntary stranding of a vessel is not a ground for general average contribution, since such an act is done

¹¹⁶ See Hughes, *Adm.* p. 39.

¹¹⁷ *McAndrews v. Thatcher*, 3 Wall. 366, 18 L. Ed. 155; *Fowler v. Rathbone*, 12 Wall. 114, 20 L. Ed. 281; *Hobson v. Lord*, 92 U. S. 404, 23 L. Ed. 613; *Burton v. English*, 12 Q. B. Div. 218. See, also, *Wright v. Marwood*, 7 Q. B. Div. 67.

¹¹⁸ Hughes, *Adm.* p. 41.

¹¹⁹ *Padelford v. Boardman*, 4 Mass. 548; *Stevens v. Wallace*, 3 Q. B. Div. 69; *Hall v. Janson*, 4 El. & Bl. 500, 82 E. C. L. 500; *Barker v. Insurance Co.* 8 Johns. (N. Y.) 307, 5 Am. Dec. 339; *Hazleton v. Insurance Co. (D. C.)* 12 Fed. 159.

with a view to saving the vessel as well as the cargo.¹²⁰ But in this country the rule is otherwise; it being well settled that when the master, in his effort to save the cargo, intentionally runs his vessel aground, as he would not otherwise have done, the damage to the vessel is a subject for general average contribution by the cargo if it is saved.¹²¹

THE INSURER'S LIABILITY—TOTAL LOSS.

225. The insurer becomes liable, under the terms of his policy, as for a total loss, when the loss is either actually or constructively total.

226. AN ACTUAL TOTAL LOSS exists when the subject-matter of the insurance is wholly destroyed or lost, or when it is so damaged as no longer to exist in its original character.

227. A CONSTRUCTIVE TOTAL LOSS exists, (a) according to the English rule, when the subject-matter of the insurance, while still existent in specie, is so damaged as not to be worth, when repaired, the cost of the repairs; (b) according to the American rule, when the vessel is so damaged that the cost of repairs would exceed one-half of the value of the vessel as repaired.

Like any other insurer, the underwriter of marine risks is liable in accordance with the terms of his contract. The general principles governing the measure of that liability have already been sufficiently considered elsewhere. It now remains to discuss that doctrine so strikingly peculiar to marine insurance—total loss and abandonment.

Actual Total Loss.

The rule for determining when a marine loss is actually total is, in effect, the same as that previously discussed in connection with the fire policy.¹²² In case of marine losses it may be stated generally as in the black-letter text above. When a vessel sinks in deep water,¹²³ or is captured and condemned,¹²⁴ or is burned, or runs on a reef and is broken wholly to pieces, the loss is actually total. So, when a vessel is so badly injured that she no longer exists as a ship, but is a mere confused mass of material, an actual total loss has been suffered.¹²⁵ But if she still remains a ship, capable of being repaired and

¹²⁰ *Arnould, Mar. Ins.* (7th Ed.) § 939.

¹²¹ *THE STAR OF HOPE*, 9 Wall. 203, 19 L. Ed. 638, *Richards, Ins. Cas.* 428; *Barnard v. Adams*, 10 How. 270, 13 L. Ed. 417.

¹²² See ante, p. 491.

¹²³ *Merchants' S. S. Co. v. Commercial Mut. Ins. Co.*, 51 N. Y. Super. Ct. 444; *Crosby v. Insurance Co.*, 5 Bosw. (N. Y.) 369.

¹²⁴ *Sawyer v. Insurance Co.*, 12 Mass. 291; *Monroe v. Insurance Co.*, 52 Fed. 777, 3 C. C. A. 280, 5 U. S. App. 179; *Mullet v. Shedden*, 13 East, 304; *Abel v. Potts*, 3 Esp. 242, 6 Rev. Rep. 826.

¹²⁵ *Merchants' S. S. Co. v. Commercial Mut. Ins. Co.*, 51 N. Y. Super. Ct. 444; *Burt v. Insurance Co.*, 9 Hun (N. Y.) 383.

of again sailing upon the seas, the loss is not actually total, even though the cost of repairing her would be greater than her value when repaired. In the latter case the loss would be constructively total, as we shall presently see.

Actual Total Loss of Goods.

A loss of goods is total when the goods are wholly lost or destroyed,¹²⁶ or when they are so greatly damaged as to be worthless.* The question whether a loss of goods insured is total or only partial is of great importance in cases of insurances "warranted free from particular average," which means that the insurer will not be liable for any loss not total. Thus, in the leading case of *Great Western Ins. Co. v. Fogarty*,¹²⁷ certain machinery, constituting a single sugar-packing apparatus, was shipped with insurance subject to such a warrant. The vessel was wrecked, but a part of the machinery, about one-half in weight, was recovered by the insurer and tendered to the insured in a very rusty condition. As only a part of the machinery had been actually lost, the insurer claimed that there was only a partial loss, for which he was not liable. But the court held that as the parts recovered were without value as a machine, and of very small value as old iron, and so rusty as not to be worth using in making another machine, there was, in effect, a total loss.

But a different rule applies where such insurance covers a large number of articles of the same kind, or a bulk of homogeneous goods. Thus, where a part of a shipment of hides was lost, it was held to be only a partial loss of the whole and not a total loss as to a part.¹²⁸ So, where more than half of a cargo of corn was lost, and the remainder seriously damaged, the loss was only partial.¹²⁹ This rule

¹²⁶ In *Robinson v. Insurance Co.*, 3 Sumn. (C. C.) 220, Fed. Cas. No. 11,949, a cargo of goods, permanently prevented from arriving at the port of destination by reason of the perils insured against, was held a total loss. See, also, *BONDRETT v. HENTIGG*, 1 Holt, 149, 3 E. C. L. 66.

Hides and skins becoming so putrid, as a result of being soaked with water, that they endanger the lives of the crew, will be considered a total loss. *De Peyster v. Insurance Co.*, 19 N. Y. 272, 75 Am. Dec. 331. See, also, *Ogden v. Insurance Co.*, 35 N. Y. 418.

* See *Hugg v. Insurance Co.*, 7 How. (U. S.) 595, 12 L. Ed. 834; *Dyson v. Roweroft*, 3 B. & P. 474.

¹²⁷ *GREAT WESTERN INS. CO. v. FOGARTY*, 19 Wall. 640, 22 L. Ed. 216. See, also, the interesting case of *Canton Ins. Office v. Woodside*, 90 Fed. 301, 33 C. C. A. 63, in which the insurance covered the personal effects of the vessel's captain. These effects consisted of many distinct articles, most of which were lost. The court held the loss total as to the separate articles lost.

¹²⁸ *Blays v. Insurance Co.*, 7 Cranch (U. S.) 415, 3 L. Ed. 389.

¹²⁹ *Morean v. Insurance Co.*, 1 Wheat. (U. S.) 219, 4 L. Ed. 75. See, also, *Washburn & Moen Mfg. Co. v. Reliance Marine Ins. Co.*, 179 U. S. 1, 21 Sup. Ct. 1, 45 L. Ed. 49, in which the cases are reviewed.

is often varied by a stipulation that the insurer shall be liable for a total loss of a part of the whole, provided that part amounts to a specified percentage of the whole.¹³⁰

Constructive Total Loss.

As to what constitutes a constructive total loss, radically different rules obtain in England and America. The general theory of constructive total loss is undoubtedly based on the presumed course of action by an uninsured owner. If such an owner, in the exercise of an interested discretion, would abandon his property, though still existing in specie, as not being worth the probable cost of raising or repairing or other necessary expense required to make it available, it is properly regarded as constructively lost to him. And such, in effect, is the criterion established by the English courts for determining when a loss is constructively total.¹³¹

The American Rule.

The rule laid down by the American decisions, if less scientific and more arbitrary than the English rule, is also more certain in application, and therefore more satisfactory in practice. It is ordinarily spoken of as the "fifty per cent. rule," and roughly said to be that, if the vessel or other thing insured is damaged to an extent greater than fifty per cent. of its value, the insured may claim a total loss.¹³² But the more accurate statement of the rule would seem to be based upon the value of the vessel or other thing after it has been saved and repaired; that is, if the expenditures estimated to be necessary to put the vessel again in serviceable condition, or to put damaged cargo in merchantable condition, would amount to more than fifty per cent. of the value of the vessel or cargo as restored, the loss may be considered total.¹³³

The value of the vessel, the cost of repairs, and other questions of value entering into the application of the rule as to constructive total loss, must be determined as of the time and under the circumstances

¹³⁰ Note the memorandum in the policy in suit in *Washburn & Moen Mfg. Co. v. Reliance Marine Ins. Co.*, supra. See, also, *Wadsworth v. Insurance Co.*, 4 Wend. (N. Y.) 33; *Moses v. Insurance Co.*, 6 Johns. (N. Y.) 219; *SILLOWAY v. INSURANCE CO.*, 12 Gray (Mass.) 73; *Brooke v. Insurance Co.*, 4 Mart. N. S. (La.) 640.

¹³¹ *Rankin v. Potter*, L. R. 6 H. L. 83; *Rosetto v. Gurney*, 11 C. B. 176, 73 E. C. L. 176; *Domett v. Young, Car. & M.* 465; *Fleming v. Smith*, 1 H. L. Cas. 513; *Irving v. Manning*, 1 H. L. Cas. 289; *Moss v. Smith*, 9 C. B. 94; *Allen v. Sugrue*, 3 M. & R. 9, 3 B. & C. 561.

¹³² See *Washburn & Moen Mfg. Co. v. Reliance Marine Ins. Co.*, 179 U. S. 1, 16, 21 Sup. Ct. 1, 45 L. Ed. 49.

¹³³ *BRADLIE v. INSURANCE CO.*, 12 Pet. (U. S.) 378, 9 L. Ed. 1123; *Fulton Ins. Co. v. Goodman*, 32 Ala. 127; *Cincinnati Ins. Co. v. Bakewell*, 4 B. Mon. (Ky.) 541.

existing¹³⁴ when the abandonment under claim of total loss was made. The mere fact that some good fortune may have subsequently occurred to lessen the expense of saving vessel or cargo, or to make the damage less than it seemed probable that it would be, does not render invalid a previous claim of total loss, made with reasonable reference to all the probabilities of the case.¹³⁵

ABANDONMENT.

228. When damage suffered by an insured venture is such as to constitute a constructive total loss, the insured may give notice of abandonment to the underwriter, and claim the whole insurance.

In case of an actual total loss the right of the insured to claim the whole insurance is absolute. He need give no notice of abandonment, nor formally abandon to the insurer anything that may remain of the insured property.¹³⁶ But it seems that the insurer, paying as for a total actual loss, is entitled to take possession of any such remnants that may be saved.¹³⁷

But when the loss is only technically total, the insured cannot claim the whole insurance without showing due regard to the interest which the underwriter may take in the abandoned property. Therefore, whenever the underwriter, by prompt action, might be able to save some portion of the insured property, he is entitled to timely notice of abandonment by the insured, and cannot be made liable for a total loss without it.¹³⁸ Such notice of abandonment will not, however, be a condition precedent to the insured's right to recover in those rare cases in which the receipt of such notice could not by any possibility

¹³⁴ *Center v. Insurance Co.*, 7 Cow. (N. Y.) 564; *Smith v. Insurance Co.*, 7 Metc. (Mass.) 448; *Greely v. Insurance Co.*, 9 Cush. (Mass.) 415; *Goold v. Shaw*, 1 Johns. Cas. (N. Y.) 293; *Patapsco Ins. Co. v. Southgate*, 5 Pet. (U. S.) 604, 8 L. Ed. 243.

¹³⁵ See *Bradlie v. Insurance Co.*, 12 Pet. (U. S.) 378, 9 L. Ed. 1123; *Orient Mut. Ins. Co. v. Adams*, 123 U. S. 67, 8 Sup. Ct. 68, 31 L. Ed. 63.

¹³⁶ *Parker, C. J.*, said, in *Gordon v. Insurance Co.*, 2 Pick. (Mass.) 249: "The money arising from the sale in such case must be held by the master to the use of the underwriters; it is their property without any abandonment; and, if it comes to the hands of the insured, it may be deducted from the loss as so much paid."

¹³⁷ *Stewart v. Insurance Co.*, 2 H. L. Cas. 183.

¹³⁸ *New Orleans Ins. Co. v. Piaggio*, 16 Wall. (U. S.) 378, 21 L. Ed. 358; *McConochie v. Insurance Co.*, 26 N. Y. 477; *Bosley v. Insurance Co.*, 3 Gill & J. (Md.) 450, 22 Am. Dec. 337; *Taber v. Insurance Co.*, 131 Mass. 239; *Globe Ins. Co. v. Sherlock*, 25 Ohio St. 50; *American Ins. Co. v. Francia*, 9 Pa. 390; *Thomas v. Insurance Co.*, 45 Me. 116; *Hubbell v. Insurance Co.*, 74 N. Y. 246; *Townsend v. Phillips*, 2 Root (Conn.) 400; *Gomila v. Insurance Co.*, 40 La. Ann. 553, 4 South. 490.

benefit the insurer; as, for example, when the insured learned at the same time of the damage to insured goods and their sale.¹³⁹

Upon receiving notice of abandonment, the underwriter may accept or reject the abandonment. If he accepts, he becomes at once liable for the whole of his insurance,¹⁴⁰ and also becomes entitled to all rights which the insured possessed in the thing insured.¹⁴¹ He acquires the same title to the abandoned vessel as he might have acquired by purchase. He may save and repair her, sell her, or otherwise do as he will with her. If the injury to the vessel was due to the tort of another, the insurer's right of subrogation, heretofore limited to the amount of payments made by him, becomes extended by abandonment to the full amount recoverable from the tortfeasor, even though that may exceed the amount of insurance paid.¹⁴²

The acceptance of an abandonment fixes the rights of the parties, and no subsequent developments affecting the expediency of either the abandonment or the acceptance can give either party the right to rescind the transaction.¹⁴³

If the insurer declines to accept a proper abandonment, the insured may bring his action for the whole insurance, his recovery, of course, to be diminished to the extent of any benefits he may have received on account of the damaged property. If the abandonment was improperly made, the insurer is liable in such an action to the extent of the damage proved.

¹³⁹ *ROUX v. SALVADOR*, 3 Bing. N. C. 266.

¹⁴⁰ *Phoenix Ins. Co. v. Copelin*, 9 Wall. (U. S.) 461, 19 L. Ed. 739; *Fulton Ins. Co. v. Goodman*, 32 Ala. 108; *Watson v. Insurance Co.*, 1 Bin. (Pa.) 47; *Reynolds v. Insurance Co.*, 22 Pick. (Mass.) 199, 33 Am. Dec. 727; *Cincinnati Ins. Co. v. Bakewell*, 4 B. Mon. (Ky.) 541; *Buffalo City Bank v. Northwestern Ins. Co.*, 30 N. Y. 251; *Childs v. Insurance Co.*, 2 Sandf. (N. Y.) 76; *Citizens' Ins. Co. v. Glasgow*, 9 Mo. 411.

¹⁴¹ *Patapsco Ins. Co. v. Southgate*, 5 Pet. (U. S.) 622, 8 L. Ed. 243; *The Manitoba (D. C.)* 30 Fed. 129; *Kirby v. Insurance Co. (D. C.)* 27 Fed. 221; *Mercantile Marine Ins. Co. v. Clark*, 118 Mass. 288; *Mercantile Ins. Co. v. Calebs*, 20 N. Y. 174; *Hooper v. Whitney*, 19 La. 267; *Northwestern Transp. Co. v. Thames & M. Ins. Co.*, 59 Mich. 214, 26 N. W. 336; *CINCINNATI INS. CO. v. DUFFIELD*, 6 Ohio St. 200, 67 Am. Dec. 339; *Norton v. Insurance Co.*, 16 Ill. 235.

¹⁴² *North of England Iron Steamship Ins. Ass'n v. Armstrong*, L. R. 5 Q. B. 244; *Yates v. Whyte*, 4 Bing. N. C. 272, 33 E. C. L. 349; *Mercantile Marine Ins. Co. v. Clark*, 118 Mass. 288.

¹⁴³ *Northwestern Transp. Co. v. Insurance Co. (C. C.)* 24 Fed. 171; *Fulton Ins. Co. v. Goodman*, 32 Ala. 108; *Lee v. Boardman*, 3 Mass. 238, 3 Am. Dec. 134; *Dickey v. Insurance Co.*, 3 Wend. (N. Y.) 658, 20 Am. Dec. 763; *Fuller v. Insurance Co.*, 31 Me. 325; *Maryland Ins. Co. v. Bathurst*, 5 Gill & J. (Md.) 230; *Cincinnati Ins. Co. v. Bakewell*, 4 B. Mon. (Ky.) 541; *Wood v. Lincoln Ins. Co.*, 6 Mass. 479, 4 Am. Dec. 163.

SUE AND LABOR CLAUSE.

229. Under the sue and labor clause of the marine policy, the insurer may become liable to pay the insured, in addition to the loss actually suffered, such expenses as he may have incurred in his efforts to protect the property against a peril for which the insurer would have been liable.

That term of the American policy known as the "sue and labor clause" reads as follows: "And in case of any loss or misfortune, it shall be lawful and necessary to and for the assured, his factors, servants and assigns, to sue, labor, and travel for, in and about the defense, safeguard and recovery of the said goods and merchandises, or any part thereof, without prejudice to this insurance, * * * to the charges whereof the said insurance company will contribute according to the rate and quantity of the sum herein insured."

The form of the clause in Lloyd's policy, while somewhat more verbose, is to the same effect.

This curious clause is not a part of the contract of insurance,¹⁴⁴ but an independent, collateral agreement, which is, however, to be construed in connection with the contract of insurance to which it is attached. Its purpose is to stimulate the owner of the insured venture, or his representatives, to do all things possible to avoid loss or damage, or to lessen its extent when incurred, by providing compensation for their efforts.¹⁴⁵ The insurer's liability under this sue and labor clause is wholly distinct from the question of his liability to indemnify the insured for a loss incurred.¹⁴⁶ If the insured has labored to preserve the venture from a peril for which the underwriter would be liable, the latter must make good the insured's expenditures in that behalf,¹⁴⁷ even though the property is subsequently lost through an excepted peril. So, the underwriter is equally liable under this clause, even though he has become also liable to pay the full amount of his insurance, because of a total loss in spite of the insured's suing and laboring. It thus comes about that the underwriter sometimes apparently becomes liable for a greater sum than is expressed on the face of his policy.

¹⁴⁴ *Lohre v. Aitchison*, 2 Q. B. Div. 509; *Nicholson v. Chapman*, 2 H. Bl. 257; *Xenos v. Fox*, L. R. 3 C. P. 630, L. R. 4 C. P. 665.

¹⁴⁵ *AITCHISON v. LOHRE*, 1 Q. B. Div. 502, 3 Q. B. Div. 553, 4 App. Cas. 755; *Mitchell v. Edle*, 1 Term R. 608; *Kidston v. Insurance Co.*, L. R. 1 C. P. 535, Exch. 2 C. P. 357.

¹⁴⁶ *AITCHISON v. LOHRE*, 1 Q. B. Div. 502, 3 Q. B. Div. 553, 4 App. Cas. 755; *Nicholson v. Chapman*, 2 H. Bl. 257; *Xenos v. Fox*, L. R. 3 C. P. 630, L. R. 4 C. P. 665.

¹⁴⁷ *Kidston v. Insurance Co.*, L. R. 1 C. P. 535, Exch. 2 C. P. 357.

From the wording of the sue and labor clause, it is apparent that two requisites must exist in order that the expense of suing and laboring shall be chargeable to the insurer:¹⁴⁸ (1) The efforts made to preserve the thing insured must have been made by the person insured, or by some one employed as his representative. Therefore, salvors cannot make, nor can salvage payments be made, a claim under this clause, unless the salvors work under the employ of the owner or the master.¹⁴⁹ (2) The loss or damage which the insured labors to avoid must be such as would be chargeable to the insurer if it should occur.¹⁵⁰ The purpose of the clause is not to stimulate philanthropic heroism, but to lessen the loss for which the underwriter would be liable.¹⁵¹ The insurer is certainly not commercially interested in securing protection of the venture against a misfortune for which he had declined to assume responsibility. Thus, when insurance is warranted free of particular average, the insurer would not be liable for expenses incurred in avoiding a partial loss.¹⁵²

Of course, the expense of repairing losses covered by the policy is not chargeable to the insurer under the sue and labor clause, since it forms a part of the loss to be indemnified.¹⁵³

¹⁴⁸ See *Richards, Ins.* 252.

¹⁴⁹ See *International Nav. Co. v. Atlantic Mut. Ins. Co.* (D. C.) 100 Fed. 313; *AITCHISON v. LOHRE*, 4 App. Cas. 755.

¹⁵⁰ *Kidston v. Insurance Co.*, L. R. 1 C. P. 535, Exch. 2 C. P. 357. See, also, *Booth v. Gair*, 15 C. B. (N. S.) 291, 33 L. J. C. P. 99.

¹⁵¹ *Zenos v. Fox*, L. R. 3 C. P. 630, 4 C. P. 665.

¹⁵² *Kidston v. Insurance Co.*, L. R. 1 C. P. 543.

¹⁵³ *Alexandre v. Insurance Co.*, 51 N. Y. 253.

CHAPTER XVI.

ACCIDENT INSURANCE.

- 230. In General.
- 231. Accident Policies and Their Construction.
- 232. Accidental Injuries—External, Violent, and Accidental Causes.
- 233. Disease Induced by Accident—Proximate Cause.
- 234. External and Visible Signs of Injury.
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- 240. Voluntary and Unnecessary Exposure to Injury.
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- 243. Injuries Received while Intoxicated.
- 244. Liability of the Insurer—Total Disability.
- 245. Right to an Autopsy.

IN GENERAL.

230. Accident insurance is similar in most respects to life insurance, of which it is properly a branch. The same rules of law apply to the making of the accident insurance contract, and to its construction when made, as have already been discussed as applicable to life insurance.

As heretofore shown, accident insurance is the most recently developed of all the important branches of insurance, being derived from the practice of life insurance. Most of the conditions existing in connection with contracts of life insurance are found present also in the writing of accident policies, so that it will not be necessary for us to consider such questions as pertain to the making of the contract, representations, concealments, and warranties, waiver and estoppel, and the other numerous matters that have already been discussed in treating of the life insurance policy.

Accident insurance is so closely akin to life insurance that it is generally held that statutes which have been enacted for the regulation of the business of life insurance, or for the purpose of fixing the rights of parties under contracts of life insurance, apply equally well to those of accident insurance.¹

¹ Thus, a statute declaring that breach of warranty shall not avoid a policy of insurance unless the warranty is materially or fraudulently false, applies to accident insurance. *Marvland Casualty Co. v. Gehrman*, 96 Md. 634, 54 Atl. 678.

While accident insurance is of later origin, it more clearly accords with the original principles of insurance than does life insurance. Under life insurance, the insurer undertakes to pay a certain sum upon the happening of an event which will certainly take place, the only contingency being with reference to the time at which death will occur. On the other hand, the accident insurer merely takes upon himself the risk of a misfortune which may or may not happen, and which, in fact, in the great majority of cases never does happen. Therefore, in accident insurance, there is nothing of the investment feature that requires the preservation of the reserve fund which we have found to play so important a part in the conduct of life insurance business.

ACCIDENT POLICIES AND THEIR CONSTRUCTION.

231. Accident policies vary greatly in their terms, which the courts are always zealous to construe strictly in favor of the insured.

Policies of accident insurance were originally relatively simple in form, merely promising indemnity to the insured for injury and death by accident. The uncertainty of the meaning of the word "accident," and the great liberality of the courts in extending the protection of the policy against accident to a great many injuries which the insurer did not contemplate being liable for, has induced accident companies gradually to add terms of definition and restriction to their promises, until at the present time the usual accident policy is so full of conditions defining the risk assumed, and excepting all others, that its construction is a matter of the greatest difficulty even to a perfectly fair-minded court. In connection with this policy, as with those in other branches of insurance law, the meaning of the language employed in defining the risks assumed has been greatly distorted by the constant struggle carried on between the courts striving to extend the liability of the insurer, and of the insurer attempting to so restrict his liability as to make that feat on the part of the courts impossible. The result has been to cause the greatest variation in the forms of accident policies, so that anything like a consistent treatment of the rules of construction as applied to their specific clauses is impossible.

There are, however, certain fundamental terms and usual provisions found in all of these varying forms that we may profitably consider.

The Primary Purpose of the Contract.

The first principle to be borne constantly in mind is that the courts never lose sight of the fact that an accident policy, whatever may be its form, conditions, and limitations, is intended by the parties to give indemnity for accidental injury. It will therefore be found that the

courts, wherever possible, take, as the criterion of the liability of the insurer under any form of policy, the existence of an injury properly to be called "accidental." If such an injury has been suffered, the courts will go far to hold the insurer liable for it, unless, in so doing, it would be necessary to make a new contract for the parties.

ACCIDENTAL INJURIES—EXTERNAL, VIOLENT, AND ACCIDENTAL CAUSES.

- 232.** An accidental injury is a bodily injury caused by some external force or agency, operating contrary to the intention of the insured, unexpectedly, and not according to the usual order of events. The accident policy usually defines an accidental injury as one due to external, violent, and accidental causes.

Accidental Injury and Disease.

The term "accident" has been defined in many different ways. Thus, it is defined by a standard law dictionary² as "an event which, under the circumstances, is unusual, and unexpected by the person to whom it happens." Neither this definition, however, nor any other that is to be found in the dictionaries, will serve as an effective guide in determining whether a given injury is due to accident or not. In fact, there are many bodily misfortunes recognized as diseases that will come fairly within any of the definitions of the term "accident" to be found in the books. This is naturally accounted for by the fact that, in the broadest sense of the term, practically every disease results from accident, inasmuch as it is unexpected by the person who contracts it, and certainly it is contracted without his desire or intention. Thus, the drinking of water infected with typhoid fever germs might be termed an accident from which very serious consequences may ensue, yet it is plain that the parties to a contract of accident insurance do not contemplate an insurance against such a misfortune as the accidental contracting of a disease.³ This illustration, however, makes apparent

² Bouvier. Black defines it as "an unforeseen event occurring without the will or design of the person whose mere act causes it; an unusual, unexpected, or undesigned occurrence." This definition would exclude murder, or other injuries intentionally inflicted by another, which all authorities agree are accidental injuries.

³ The physiological distinction between contracting typhoid fever from accidentally drinking water infected by germs, and contracting blood poisoning through the infection, by germs, of a toe accidentally abraded by wearing a new shoe, is so subtle, if it exists at all, as not to be capable of expression in language intelligible to any one but a physician. Yet the former is a disease, and the latter has been held an accidental injury. *WESTERN COMMERCIAL TRAVELERS' ASS'N v. SMITH*, 85 Fed. 401, 56 U. S. App. 893, 29 C. C. A. 223, 40 L. R. A. 653. Every argument used by the court will apply to the one case as well as to the other.

the great difficulty which is encountered by the courts in deciding just what the parties to an accident contract do contemplate by the use of the term "accidental injury," and of the mass of cases in which questions of accident insurance have been litigated the greater number involve merely the question whether the injury suffered in each case is included under the risk assumed by the insurer in his policy.

Definitions being thus unreliable, we can come to a satisfactory understanding of what is regarded in law as an accidental injury only by considering the cases as they have actually come before the courts for decision. In *Lovelace v. Travelers' Protective Ass'n*,⁴ the question arose under the following facts: The deceased, who was insured against "death by accident," while a guest in a tavern was provoked by the indecent behavior of another guest to attempt to expel him from the house. In the struggle which ensued, the insured was shot and killed by the one whom he sought to expel. The only question before the court was whether death under such circumstances was accidental or not. It was claimed by the defendant that such a fatal injury was but the natural and probable consequence of such an assault, and therefore could not be regarded as accidental. The court concluded, however, that the deceased could not reasonably have expected such a fatal termination of his attempt to expel a disagreeable person, since, under the circumstances, he had no reason to suppose the person attacked to be armed. The insurer was therefore held liable.⁵ In other cases, however, where the deceased had entered into a combat under such circumstances as would justify an expectation that fatal results would probably ensue, it has been held that injuries received were not accidental.⁶ In another case it has been held that death by hanging at the hands of a mob was an unexpected happening that might be regarded as an accident.⁷ Likewise it has been held by the Supreme Court of the United States⁸ that, when the insured received an injury by the wrenching of his muscles when jumping from a platform four or five feet high to the ground, the injury could be regarded as an accident, although the insured intentionally took the leap. While he intended to

⁴ *LOVELACE v. TRAVELERS' PROTECTIVE ASS'N*, 126 Mo. 104, 28 S. W. 877, 30 L. R. A. 209, 47 Am. St. Rep. 633.

⁵ Other cases to the same effect are numerous. See *Hutchcraft's Ex'r v. Insurance Co.*, 87 Ky. 300, 8 S. W. 570, 12 Am. St. Rep. 484; *Supreme Council v. Garrigus*, 104 Ind. 133, 3 N. E. 818, 54 Am. Rep. 298; *Richards v. Insurance Co.*, 89 Cal. 170, 26 Pac. 762, 23 Am. St. Rep. 455; *TRAVELERS' INS. CO. v. McCONKEY*, 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. Ed. 308.

⁶ *Taliaferro v. Association*, 80 Fed. 368, 49 U. S. App. 275, 25 C. C. A. 494.

⁷ *FIDELITY & CASUALTY CO. v. JOHNSON*, 72 Miss. 333, 17 South. 2, 30 L. R. A. 206. The record does not disclose the color of the insured.

⁸ *United States Mut. Acc. Ass'n v. Barry*, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60.

leap, he did not intend to leap so as to suffer the injury which caused his death.

Injuries inflicted by another person upon the insured,⁹ or those self-inflicted when insane,¹⁰ are considered to be accidents. So are injuries due to mistakes in taking medicine,¹¹ to the inhaling of gas,¹² and to coming in contact with poisonous substances unintentionally, considered accidental injuries. In *Omberg v. United States Mut. Acc. Ass'n*,¹³ the Kentucky Supreme Court held that the bite of an insect, inflicted upon the toe of the insured, which caused blood poisoning to set in and the consequent death of the victim, was an accident for which the insurer should be held liable. In a New York case, under somewhat similar facts, the contrary conclusion was reached.¹⁴ In Texas it was held by the Court of Civil Appeals¹⁵ that death due to intestinal inflammation set up by the eating of unsound oysters was an accidental injury; but upon appeal the Supreme Court reversed the decision of the lower court, principally, however, upon the ground that the eating of the oysters brought the injury, if it was accidental, under the terms of an exception in the policy.

Again, death by choking consequent upon an attempt to swallow a piece of beefsteak has been held to be death by accident.¹⁶ But it is well settled that death by sunstroke,¹⁷ though unusual, is not to be

⁹ The fact that the blow struck by the other party was designed makes the injury to the victim none the less accidental if he had no reason to expect it in the natural course of events. *American Acc. Co. v. Carson*, 99 Ky. 441, 36 S. W. 169, 34 L. R. A. 301, 59 Am. St. Rep. 473.

¹⁰ *ACCIDENT INS. CO. v. CRANDAL*, 120 U. S. 527, 7 Sup. Ct. 685, 30 L. Ed. 740.

¹¹ *Carnes v. Association*, 106 Iowa, 281, 76 N. W. 683, 68 Am. St. Rep. 306. Here it was said that if the insured died because he took more morphine than he intended, the death was accidental, but it would be otherwise if he had taken only as much as he had intended, not knowing that such a dose would be fatal. But see *Dezell v. Fidelity & Casualty Co.*, 176 Mo. 253, 75 S. W. 1102.

¹² *United States Mut. Acc. Ass'n v. Newman*, 84 Va. 52, 3 S. E. 805.

¹³ 101 Ky. 303, 40 S. W. 909, 72 Am. St. Rep. 413.

¹⁴ *Bacon v. Association*, 123 N. Y. 304, 25 N. E. 399, 9 L. R. A. 617, 20 Am. St. Rep. 748. In this case some putrid animal matter came in contact with an abrasion on the insured's lip, causing infection and the formation of a malignant pustule, which proved fatal. The court held that death was due to disease merely.

¹⁵ *Maryland Casualty Co. v. Hudgins* (Civ. App.) 72 S. W. 1047, reversed in Supreme Court, 76 S. W. 745, 64 L. R. A. 349.

¹⁶ *American Acc. Co. v. Reigart*, 94 Ky. 547, 23 S. W. 191, 21 L. R. A. 651, 42 Am. St. Rep. 374.

¹⁷ *SINCLAIR v. ASSURANCE CO.*, 3 E. & E. 478; *Dozier v. Fidelity & Casualty Co. of New York* (C. C.) 46 Fed. 446, 13 L. R. A. 114. In *Railway Officials' & Employes' Acc. Ass'n v. Johnson*, 109 Ky. 261, 58 S. W. 694, 52 L. R. A. 401, 95 Am. St. Rep. 370, often cited as contra, the policy in terms ex-

regarded as accidental; nor is the mere rupture of a blood vessel to be regarded as an accident, unless it was induced by some sort of violent accidental occurrence.¹⁸ So, when the insured, while stooping over to put on his socks, suffered such a disarrangement of the intestines that death ensued, his fatal injury was held not to be accidental.¹⁹

External, Violent, and Accidental Causes.

The terms "external" and "violent" have been added by the insurer for the purpose of restricting the sense of the term "accidental," with which they are coupled, but their presence has had little, if any, influence upon the construction given to the term "accidental cause or injury." The term "external" applies to the force, and not to the injury.²⁰ Thus, poison taken into the system, and operating entirely internally, is nevertheless an external cause, as is the water which causes death by drowning, and gas which causes asphyxiation. Likewise, the term "violent," as applied to causes of accidental injury, means merely that the cause is efficient in producing a harmful result. It is not necessary that it shall be violent in the sense of breaking tissues or otherwise physically and visibly affecting the body.²¹ Thus, where the insured was injured by his straining efforts to stop his horse that was running away, it was held that the cause of the injury was both external and violent, although the result was entirely internal, being probably a rupture of a blood vessel near the heart.²² And so it is generally held that where an injury is received in attempting to lift a heavy weight, or from any other kind of over-exertion, the result may be attributed to an external and violent accidental cause.²³

pressly recognized sunstroke as one of the risks assumed, subject to conditions.

¹⁸ See *Standard Life & Accident Ins. Co. v. Schmaltz*, 66 Ark. 588, 53 S. W. 49, 74 Am. St. Rep. 112. Here the rupture was caused by a sudden and violent wrenching of the body in an effort to remove a cylinder head from an engine. A similar rupture caused by an effort to close a shutter was held not to be accidental. *Feder v. Association*, 107 Iowa, 538, 78 N. W. 252, 43 L. R. A. 693, 70 Am. St. Rep. 212.

¹⁹ *Clidero v. Insurance Co.*, 29 Scot. L. R. 303. See, also, *Southard v. Assurance Co.*, 34 Conn. 574, Fed. Cas. No. 13,182.

²⁰ *American Acc. Co. v. Reigart*, 94 Ky. 547, 23 S. W. 191, 21 L. R. A. 651, 42 Am. St. Rep. 374.

²¹ See the excellent discussion of this matter in *Paul v. Insurance Co.*, 112 N. Y. 472, 20 N. E. 347, 3 L. R. A. 443, 8 Am. St. Rep. 758.

²² *McGLINCHEY v. FIDELITY & CASUALTY CO.*, 80 Me. 251, 14 Atl. 13, 6 Am. St. Rep. 190, Woodruff, Ins. Cas. 277.

²³ *Standard Life & Accident Co. v. Schmaltz*, 66 Ark. 588, 53 S. W. 49, 74 Am. St. Rep. 112; *RUSTIN v. INSURANCE CO.*, 58 Neb. 792, 79 N. W. 712, 46 L. R. A. 263, 76 Am. St. Rep. 136, Woodruff, Ins. Cas. 294.

DISEASE INDUCED BY ACCIDENT—PROXIMATE CAUSE.

233. It frequently occurs that the death of the person insured under an accident policy is caused by some disease induced by an accidental injury. If the circumstances are such as to make the accident, and not the disease, the proximate cause of the death, the insurer is liable as for an accidental injury.

The distinction of proximate from remote causes, always difficult to make, often becomes peculiarly difficult in deciding questions arising under accident policies. The insurer, under an accident policy, is not liable for death by mere disease, even in the absence of the usual clause expressly excluding disease from among the risks assumed. But it frequently happens that, while the immediate cause of death is a disease, that disease is directly attributable to some accident that has previously happened. If the causal connection between the disease and accident is direct and clear, the death will be considered as due to the accident as proximate cause, and not to the disease. Thus, where the insured's toe was bruised and rubbed by a new shoe, which injury caused blood poisoning from which he died, it was held that the cause of his death was the accidental injury to his toe.²⁴ So, in a case decided by the Massachusetts Supreme Court, where the insured had died of peritonitis that was induced by a heavy fall, the court held that, although the insured had once before been afflicted with this disease, and was therefore evidently peculiarly liable to contract it, the proximate cause of his death was the accidental fall, so that the insurer was liable for his death.²⁵ In connection with the facts of this case, the court makes this clear statement of the doctrine of proximate cause, as applicable to such cases: "The law does not consider the cause of causes beyond seeking the efficient predominant cause, which, following it no farther than those consequences that might have been anticipated as not unlikely to result from it, has produced the effect. An injury which might naturally produce death in a person of a certain temperament or state of health is the cause of his death, if he dies by reason of it, even if he would not have died if his temperament or previous health had been different; and this is so, as well when death comes through the medium of a disease directly induced by the injury, as when the injury immediately interrupts the vital processes."

²⁴ *WESTERN COMMERCIAL TRAVELERS' ASS'N v. SMITH*, 85 Fed. 401, 56 U. S. App. 393, 29 C. C. A. 223, 40 L. R. A. 653.

²⁵ *FREEMAN v. ASSOCIATION*, 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753. So, it has been held that an accidental fall, causing a rupture of a kidney and consequent death, was the proximate cause of the death, though the cancerous condition of the kidney made the rupture possible. *Fetter v. Fidelity & Casualty Co.*, 174 Mo. 256, 73 S. W. 592, 61 L. R. A. 459.

In another case an insurer was held liable for the death of the insured, caused by peritoneal inflammation which was induced by a blow received from the handle of a pitchfork which accidentally slipped from his grasp while being used in pitching hay.²⁶ So, an accident insurance company was held liable for a death caused directly by inflammation of the intestines which had been weakened by disease, the inflammation being caused by the presence of hard food substances that had been swallowed by the insured, who had no knowledge of the weakened condition of his digestive organs.²⁷

Another and different phase of the question of proximate and remote cause appears in the leading English case of *Lawrence v. Accidental Ins. Co.*²⁸ In that case the insured was standing near a railway track upon which a locomotive was approaching. He was suddenly seized with a fit of illness which caused him to fall forward helpless upon the track, where he was almost immediately crushed to death under the wheels of the locomotive. The defendant claimed that it was not liable under an accident policy for the death of the deceased, on the ground that the proximate cause of his death was his fit of illness, while the plaintiff claimed that the predominant cause was his being run over by the locomotive, which was accidental. The policy provided that the insurance company should be liable only when the accidental injury "was the sole and direct cause of death to insured." The court held that the efficient cause of the death of the insured was the locomotive, which happened accidentally to be present at that time, while the fit was merely the cause of his being upon the track in a place of danger, and therefore remote.

EXTERNAL AND VISIBLE SIGNS OF INJURY.

234. The usual term of the accident policy, providing that the insurer will be liable only for those injuries of which there shall be some external and visible sign, does not require that the injury itself shall be external and visible, but merely that the evidences of accidental injury shall be external and visible.

In the course of their efforts to avoid liability for injuries and deaths due to merely natural causes, and for feigned internal injuries, difficult

²⁶ *North American Life & Accident Co. v. Burroughs*, 69 Pa. 43, 8 Am. Rep. 212.

²⁷ *Miller v. Fidelity & Casualty Co. (C. C.)* 97 Fed. 836. So, in *Travelers' Ins. Co. v. Hunter*, 30 Tex. Civ. App. 489, 70 S. W. 798, the insurer was held liable for a fatal attack of rheumatism caused by an accident.

²⁸ 7 Q. B. Div. 216, *Richards, Ins. Cas.* 522. A similar case is *Winspear v. Insurance Co.*, 6 Q. B. Div. 42, in which the insured, while crossing a river, was seized with a fit, which caused him to fall into the water and drown. The death was considered to be accidental.

to disprove, all accident insurers now insert in their policies a provision to the effect that they will not be liable for any bodily injuries that shall be suffered by the insured, unless there are found some external and visible signs of such injuries. The courts have, however, largely done away with any restrictive effects of this provision, by giving to it such a construction as seldom defeats recovery in a case in which the plaintiff would succeed in its absence. It has been held that the provision has no application whatever to injuries that result in death,²⁹ but only temporary nonfatal injuries. And when the provision is so worded as to make it clearly apply to fatal injuries, the courts have found little difficulty in discovering the requisite external and visible signs.

We must first note that the signs of injury ordinarily required need not be on the body itself, although such was the probably intended meaning of the insurers when the term was incorporated in the policy. Any sign at all indicating the occurrence of an injury that is visible to the eye, or otherwise capable of sense perception, is held to satisfy the requirements of this clause. Thus, froth on the mouth of a person who has died from asphyxiation through inhaling gas is a visible sign of the cause of his death.³⁰ It has even been held that where artificial respiration was resorted to in the case of the asphyxiated person, and the odor of inhaled gas could be detected, that was a sufficient sign of his fatal injury by inhaling gas.³¹ Discoloration of the skin is a sufficient external evidence of an internal injury,³² and the unnatural redness of one lobe of the brain discovered by autopsy has been also regarded as an external visible sign of an accident.³³ Even an unusual color of the skin is sufficient;³⁴ and the court may take into consideration as evidence other external circumstances, not immediately connected with the body, but which would show the cause and probable presence of an accident, as the odor of gas in the room in which a dead body is found.³⁵

In another case, where the injury for which it was sought to hold

²⁹ *McGLINCHEY v. FIDELITY & CASUALTY CO.*, 80 Me. 251, 14 Atl. 13, 6 Am. St. Rep. 190. In this case the court said: "There are reasons for the condition applying to a surviving claimant. He has unusual chance for feigning an internal injury, if disposed to defraud the insurers. But no such protection is required where the accident causes death. The dead body is external and visible sign enough that the injury was received."

³⁰ *United States Mut. Acc. Ass'n v. Newman*, 84 Va. 52, 3 S. E. 805.

³¹ *Mennelly v. Assurance Corp.*, 148 N. Y. 596, 43 N. E. 54, 31 L. R. A. 686, 51 Am. St. Rep. 716.

³² *Thayer v. Insurance Co.*, 68 N. H. 577, 41 Atl. 182.

³³ *Union Casualty & Surety Co. v. Mondy* (Colo. App.) 71 Pac. 677.

³⁴ *Horsfall v. Insurance Co.*, 32 Wash. 132, 72 Pac. 1023, 63 L. R. A. 425.

³⁵ See *Mennelly v. Assurance Corp.*, 148 N. Y. 596, 43 N. E. 54, 31 L. R. A. 686, 51 Am. St. Rep. 716.

the insurer liable was entirely internal, presenting no evidence whatever upon the surface of the body of its presence, a physician was allowed to testify that by external pressure with the hand he could detect the presence of the internal injury; and such evidence was held to satisfy the requirement of an external sign of the injury.³⁶

The result of the cases on this subject has been well summarized in the instruction of the court to the jury in *Barry v. United States Mut. Acc. Ass'n*,³⁷ as follows: "Visible signs of injury," within the meaning of this policy, are not to be confined to broken limbs or bruises on the surface of the body. There may be other external indications or evidences of an injury. Complaint of pain is not a visible sign, because pain you cannot see. Complaint of internal soreness is not such a sign, for that you cannot see. But if the internal injury produces, for example, a pale and sickly look in the face; if it causes vomiting and retching, or bloody and unnatural discharges from the bowels; if, in short, it sends forth to the observation of the eye, in the struggle of nature, any sign of injury—then those are external and visible signs, provided they are the direct result of the injury."

RISKS OF TRAVEL.

235. Insurance against accidental injuries incurred while a passenger on a public conveyance, or other conveyance specified, is held to cover any injuries received while doing anything naturally and properly incident to the accomplishment of the journey in hand.

The first accident insurance, as well as a considerable portion of that now written, was upon travel risks alone. Those policies issued against accidents that may happen to the insured while engaged in prosecuting a journey stipulate specifically the circumstances under which the insurer will become liable, although the terms in which the assumed risks are described vary considerably. The one most frequently inserted is against accidents that may happen to the insured "while traveling as a passenger on any conveyance using steam, cable, or electricity as a motive power," or "while traveling in a public conveyance provided by a common carrier." It is clear that, when the insurance is only against injuries received while traveling in a specified manner or in a specified vehicle, the insurer should not be liable for such accidents as may happen to the insured while in other places or vehicles than those mentioned. Thus, where a certain stock dealer received a policy insuring him against injuries that might be received while riding in the public conveyances of any common carrier, he was not allowed to recover for an injury that he received by falling from

³⁶ *Gale v. Association*, 66 Hun, 600, 21 N. Y. Supp. 893.

³⁷ (C. C.) 23 Fed. 712, affirmed 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60.

the loft of a livery stable, where he was engaged in caring for the horses with which he was traveling.³³

Incidental Risks.

While it is just and proper to hold the insurer liable for only such risks as he has assumed, the courts, in deciding what risks have been assumed, will not allow themselves to be bound by the strict letter of description, but will consider that the insurer assumes the liability, not only for those accidents which may occur to the insured while he is in the vehicle expressly described, but also for those other risks that the insured must undergo as incident to the prosecution of the journey which he has undertaken. This rather subtle distinction between those risks impliedly assumed as incidental to those expressly described, and those others which are excluded by implication from the express description, may be best illustrated by considering the facts of some leading cases. In *Northrup v. Railway Passenger Assur. Co.*,³⁴ the policy promised indemnity in case of death caused by any accident while traveling by public or private conveyances. During the course of her journey it became necessary for the insured to pass from the landing of a steamboat upon which she had been traveling to the station of a railway upon which she intended to continue her journey. While going on foot the short distance between the steamboat landing and the railway station, the insured slipped and fell, receiving injuries from which she subsequently died. The insurer declined to pay the sum agreed, on the ground that the injury had not been received while traveling by any sort of conveyance, but while on foot. The New York court held, however, that the insurer was liable, since the injury was received while doing an act that was necessarily incident to the prosecution of the journey. This case goes to the extreme limit in applying the rule of construction referred to, and when the Supreme Court of the United States was asked to hold the insurer liable, under a policy similar to that in the *Northrup* Case, for injuries received by the insured traveler from robbers, while he was walking from the railway station to his home, a distance of some eight miles, it declined to extend the doctrine of the *Northrup* Case further, and reached the conclusion, that seems sufficiently apparent, that the insured was traveling on foot, and not in any of the vehicles specified in the policy.³⁵

Again, it has been held that a policy containing such provision as that now under discussion covered a fatal injury to the insured received while attempting to board a train from which he had temporarily

³³ *Fidelity & Casualty Co. of New York v. Teter*, 136 Ind. 672, 36 N. E. 283.

³⁴ 43 N. Y. 516, 3 Am. Rep. 724, Richards, Ins. Cas. 532.

³⁵ *Ripley v. Assurance Co.*, 16 Wall. (U. S.) 336, 21 L. Ed. 469.

alighted, while the train was in motion.⁴¹ But in another case, when the insured left a train at a station from which he expected to continue his journey by a later train, but afterwards turned again to speak to one of the trainmen about a matter not connected with the journey, and was injured by falling from the car platform, it was held that the insurer was not liable.⁴² As far as that train was concerned, the insured had discontinued his journey, and, when injured, was not properly engaged in the prosecution of the journey.

In a recent California case it has been held that a passenger who leaves the regular coach, and at the invitation of an officer of the railway company rides in the engine, does not cease to be a passenger, within the terms of an accident policy against travel risks.⁴³

Double Indemnity for Travel Risks.

In some accident policies it is provided that a double indemnity shall be paid for injuries received while traveling in specified conveyances. In determining when the insurer is liable for double indemnity, the same rules of construction are to be applied as in the cases just discussed above. Thus, it has been held that under such a policy the insurer is not liable for double indemnity when the insured came to his death by falling from the open platform of a railway car, the double indemnity being promised only when the injury is received while riding "in" a public conveyance.⁴⁴ Again, a paymaster of a railway company, riding from station to station in the regular discharge of his usual duties, was held not to be a passenger, within the meaning of the double indemnity clause, nor was his pay car, although merely a specially equipped coach, to be regarded as a passenger car, within the terms of the clause in question.⁴⁵

EXCEPTED RISKS—IN GENERAL.

236. The terms of an accident policy excepting risks that would otherwise be included will be construed in connection with all the terms of the instrument, so as to carry out, wherever possible, the general purpose of the contract, which is to grant indemnity for accidental injury.

As already stated above, modern accident policies are bound in numerous conditions of exception, some of which are consistent with

⁴¹ *Tooley v. Assurance Co.*, 3 Biss. (U. S.) 399, Fed. Cas. No. 14,098.

⁴² *Hendrick v. Assurance Corp. (C. C.)* 62 Fed. 893. In this case the insurance was against injuries received "as a passenger in a public conveyance provided by a common carrier."

⁴³ *Berliner v. Insurance Co.*, 121 Cal. 458, 53 Pac. 918, 66 Am. St. Rep. 49.

⁴⁴ *Van Bokkelen v. Insurance Co.*, 34 App. Div. 399, 54 N. Y. Supp. 307, affirmed in 167 N. Y. 590, 60 N. E. 1121.

⁴⁵ *Travelers' Ins. Co. v. Austin*, 116 Ga. 264, 42 S. E. 522, 59 L. R. A. 107, 94 Am. St. Rep. 125.

other terms of the policy and with the general purpose of the contract.⁴⁶ While the courts cannot make new contracts for the parties, they yet go very far in construing away exceptions that would defeat the general purpose of the contract to afford indemnity for accidental injury.

POISON, OR CONTACT WITH POISONOUS SUBSTANCES.

237. Exceptions in the policy of death or injury by taking poison or by coming in contact with poisonous substances are generally construed to refer only to intentional acts of taking poison or coming in contact with it, unless the wording of the clause is such as to make it perfectly clear that accidental poisoning is intended to be included within the exceptions.

The clauses to be found in the different insurance policies which are intended to exempt the insurer from liability for injuries due to the operation of poisonous substances differ very greatly in their wording. Where it is provided that the insurer will not be liable for injuries due to "taking poison," the courts almost unanimously hold that the insurer is still liable for the accidental taking of poison.⁴⁷ The

⁴⁶ The pervasive extent and complicated language of the list of exceptions to be found in the ordinary accident policy may be illustrated from the following quotation from the policy in suit in *TRAVELERS' INS. CO. v. MCCONKEY*, 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. Ed. 308: "Provided always, that this insurance shall not extend to hernia, nor to any bodily injury which there shall be no external and visible sign, nor to any bodily injury happening directly or indirectly in consequence of disease, nor to any death or disability which may have been caused wholly, in part, or jointly, by bodily infirmities or disease existing prior or subsequent to the date of this contract, or by the taking of poison or contact with poisonous substances, or by any surgical operation or medical or mechanical treatment; nor to any case except where the injury is the proximate and sole cause of the disability or death; and no claim shall be made under this policy when the death or injury may have been caused by dueling, fighting, wrestling, lifting or by over exertion, or by suicide (felonious or otherwise, sane or insane), or by sunstroke, freezing, or intentional injuries inflicted by the insured or any other person, or when the death or injury may have happened in consequence of war, riot, or invasion, or of riding or driving races, or of voluntary exposure to unnecessary danger, hazard, or perilous adventure, or of violating the rules of any company or corporation, or when the death or injury may have happened while the insured was, or in consequence of his having been, under the influence of intoxicating drinks, or while employed in mining, blasting, or wrecking, or in the manufacture, transportation, or use of gunpowder or other explosive substances (unless insured to cover such occupation), or while engaged in or in consequence of any unlawful act; and this insurance shall not be held to extend to disappearances, nor to any case of death or personal injury, unless the claimant under this policy shall establish by direct and positive proof that the said death or personal injury was caused by external violence and accidental means."

⁴⁷ *TRAVELERS' INS. CO. v. DUNLAP*, 160 Ill. 642, 43 N. E. 765, 52 Am.

principal object of the whole transaction being to insure against accidental injury, the courts will not allow that purpose to be defeated in any given case by an exception, unless the language of the exception is so clear and certain as to imperatively demand such a result; that is, if the parties intend to defeat the natural purpose of their contract, they must express that intention in language wholly unambiguous. Thus, it has been held that where the insured drank carbolic acid, supposing it to be peppermint, and died from the poisoning, the insurer was liable, despite the presence of the clause exempting from liability for injury by taking poison. The court thought that the ordinary meaning attached to the expression "take poison" was the intentional taking of poison, and held that the parties must be deemed to have used the terms adopted for the expression of their contract in accordance with their popular meaning.⁴⁸

In order to avoid the narrow construction placed by the courts upon the simple phrase "take poison," the accident insurers have added numerous qualifying phrases in the hope of effectively accomplishing their purpose; but even these qualifying phrases will not avail the insurer in his effort to escape liability for accidental death from poison, if there is any possible ambiguity in the language of the exception.⁴⁹

St. Rep. 355; *Omberg v. Association*, 101 Ky. 303, 40 S. W. 909, 72 Am. St. Rep. 413; *Dezell v. Fidelity & Casualty Co.*, 176 Mo. 253, 75 S. W. 1102.

But see, contra, *Early v. Insurance Co.*, 113 Mich. 58, 71 N. W. 500, 67 Am. St. Rep. 445; *Pollock v. Association*, 102 Pa. 230, 48 Am. Rep. 204.

⁴⁸ *TRAVELERS' INS. CO. v. DUNLAP*, 160 Ill. 642, 43 N. E. 765, 52 Am. St. Rep. 355.

⁴⁹ It was held in *Dezell v. Fidelity & Casualty Co.*, 176 Mo. 253, 75 S. W. 1102, that the insurer was liable for the death of the insured caused by an overdose of morphine, taken to alleviate severe pain under the advice of a physician, although the policy excepted injuries "resulting from poison or anything accidentally or otherwise taken." The argument of the court is as follows: "The policy insured 'against bodily injuries sustained through external, violent, and accidental means.' The exception was: 'This insurance does not cover * * * injuries, fatal or otherwise, resulting from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled.' It will be observed that it is not limited to poison, but extends to 'anything,' and is not confined to poison or anything taken, but includes poison or anything not only taken, but also such as may be administered, absorbed, or inhaled, and that it applies whether the same be accidentally or intentionally done. Literally construed, it would cover everything known to man that would injure or kill, whether taken by the assured himself or administered to him by a physician, or whether absorbed or inhaled without and in spite of himself, or with the aid of any one else, or as the result of natural laws. It would also cut off a recovery where the poison or anything was taken or administered to save life, and was given for the best and most scientific reasons, as fully and completely as if it was taken with suicidal intent. If this was the true meaning and intent of the insured, it ought to have been expressed in such unequivocal and plain words that there could be no misunderstanding its meaning. Instead of employing the negative

Thus, it has been held that, where the policy provided that the insurer should be exempt from liability for death by poison in any way taken, the qualifying phrase "in any way taken" referred merely to the manner of the taking of the poison, and not to the motive with which it is taken, and therefore the insurer was held liable for accidental poisoning, despite his attempted exception.⁵⁰ When, however, the language of the exception is such as to expressly include accidental poisoning, the courts have no alternative but to excuse the insurer from payment.⁵¹

It has been held that the inhaling of gas, causing the death of the insured, is not taking poison.⁵² So, death caused by the poisonous sting of an insect has been held not to be within the exception of injuries caused by poison in any form or by contact with poisonous substances.⁵³ In a recent Texas case the policy provided that "this insurance does not cover injuries, fatal or otherwise, resulting from poison or anything accidentally or otherwise administered, absorbed, or inhaled." The insured swallowed two unsound oysters, which caused inflammation of the intestines, and death. The court held that the swallowing of these oysters came within the terms of the exception as quoted above.⁵⁴

INHALING GAS.

238. Clauses in accident policies exempting the insurer from liability for death by inhaling gas are generally construed as referring only to intentional acts of inhaling gas, and not to injuries caused by accidental inhalation.

Exceptions in the policy of death by inhaling gas have given rise to much difficulty in construction. On general principles it would seem that the same rule should be applied to such exceptions as to the ex-

form of expression, and clothing the intention in such general terms, it should have been affirmatively stated that the policy meant that no recovery could be had, unless the physical evidences of the cause of the injury were apparent to the naked eye, and that the company would not pay for any injury unless the gaping wound told its own tale. The better reason supports the rule that such exceptions in such policies do not cover medicine (even though it contain poison) or anything taken or administered in good faith to alleviate physical pain, even though it results in unexpected and unintentional death."

⁵⁰ Metropolitan Acc. Ass'n v. Froiland, 161 Ill. 30, 43 N. E. 766, 52 Am. St. Rep. 359.

⁵¹ See Early v. Insurance Co., supra; McGlothter v. Accident Co., 89 Fed. 685, 60 U. S. App. 705, 32 C. C. A. 318.

⁵² United States Mut. Acc. Ass'n v. Newman, 84 Va. 52, 3 S. E. 805.

⁵³ Omberg v. Association, 101 Ky. 303, 40 S. W. 909, 72 Am. St. Rep. 413.

⁵⁴ Maryland Casualty Co. v. Hudgins (Tex. Civ. App.) 76 S. W. 745, 64 L. R. A. 349, reversing same case in Court of Civil Appeals, 72 S. W. 1047.

ception of death by poison, just considered. But the courts seem to be more unwilling to give effect to the gas clause, and have held, in practically all cases, that death due to purely accidental and unintentional inhaling of poisonous gases is not within the exception, which, it is said, is intended to apply only to cases of suicide by inhaling gas, or to cases where gas is intentionally inhaled, in surgical operations or for other like purposes.⁵⁵ A typical case presenting the difficulty of giving a fair construction to the words of this exception is *Pickett v. Pacific Mut. Life Ins. Co.*⁵⁶ In this case the policy involved contained the usual exception of "death or injury resulting from, or attributable partially or wholly to, inhalation of gas." The insured descended into a shallow well for the purpose of repairing a pump, and was quickly asphyxiated by the gas that had, in some inexplicable way, accumulated in the well. There was no reason to suspect the presence of this deadly gas in the well, and the circumstances of the death were unquestionably accidental, and by every consideration of fairness should fall within the operation of an accident policy. On the other hand, there could be no question but that the immediate cause of the death of the insured was his breathing air charged with this deadly gas, and that would seem to amount to "inhalation of gas," in the ordinary acceptance of that term. The court held, however, that inhalation meant intentional, and not accidental, inhalation, and held the insurer liable. In the opinion, the following language of the New York Court of Appeals⁵⁷ was approved: "In expressing its intention not to be liable for death from 'inhaling of gas' the company can only be understood to mean a voluntary and intelligent act of the insured, and not an involuntary and unconscious act. Read in that sense, and in the light of the context, these words must be interpreted as having reference to medical or surgical treatment, in which, ex vi termini, would be included the dentist's work or a suicidal purpose. Of course, the deceased must have, in a certain sense, inhaled gas; but, in view of the finding that death was caused by accidental means, the proper meaning of the words compels, as does the logic of the thing, the conclusion that there was not that voluntary or conscious act necessarily involved in the process of inhaling. An accident is the happening of an event without the aid and the design of the person, and which is unforeseen. * * * To inhale gas requires an act of volition on the person's part before the danger is incurred. Poison may be taken by mistake, or poisonous substances may be inad-

⁵⁵ See *Paul v. Insurance Co.*, 112 N. Y. 472, 20 N. E. 347, 3 L. R. A. 443, 8 Am. St. Rep. 758.

⁵⁶ *PICKETT v. PACIFIC MUT. LIFE INS. CO.*, 144 Pa. 79, 22 Atl. 871, 13 L. R. A. 661, 27 Am. St. Rep. 618, Woodruff, Ins. Cas. 290.

⁵⁷ Quoted from *Paul v. Insurance Co.*, supra, in which the insured was found dead in his bed, the room being full of escaped coal gas.

vertently touched; but, whatever the motive of the insured, his act precedes either fact. * * * If the policy had said that it was not to extend to any death caused wholly or in part by gas, it would have expressed precisely what the appellant now says is meant by the present phrase, and there could have been no room for doubt or mistake."⁵⁸ The courts often go so far as to hold the insurer liable for the accidental death of the insured by breathing gas, even when the policy excepts death resulting from "anything accidentally or otherwise taken, administered, absorbed, or inhaled," it being said that "accidental inhaling" means merely accidentally drawing gas into the system by a conscious and voluntary act of inspiration.⁵⁹

BODILY INFIRMITIES OR DISEASE.

239. Terms excepting injuries sustained in consequence of any disease or bodily infirmity are ordinarily construed to mean serious derangements of the bodily organs or functions, and not mere temporary disorders.

As we have already seen, the insurer is liable, in the absence of exception, for the death of the insured by disease induced by an accident, or for an accident that was due to a disease. In order to avoid such liability, modern policies usually contain a provision that the company will not be liable for injuries "resulting directly or indirectly, in whole or in part, from any disease or bodily infirmity."

The terms "disease or bodily infirmity" are defined rather liberally in favor of the insured. It is held that bodily infirmity means the state of being physically infirm, as opposed to a mere temporary condition of weakness due to hunger or other passing cause.⁶⁰ So, disease means some functional defect in the vital organs, of a serious and more or less lasting character. Thus, it has been held that, where a mere temporary fit of weakness contributed to the accident suffered, the insurer was liable despite the presence of this exempting clause.⁶¹

But it seems that this exception does away with the operation of the rule of proximate cause heretofore considered, and exempts the in-

⁵⁸ But see, contra to the reasoning of these cases, *Richardson v. Insurance Co.* (C. C.) 46 Fed. 843.

⁵⁹ *Fidelity & Casualty Co. of New York v. Waterman*, 161 Ill. 632, 44 N. E. 283, 32 L. R. A. 654. See, also, *Mennelly v. Assurance Corp.*, 148 N. Y. 596, 43 N. E. 54, 31 L. R. A. 686, 51 Am. St. Rep. 716.

⁶⁰ See *Meyer v. Fidelity & Casualty Co.*, 96 Iowa, 378, 65 N. W. 328, 59 Am. St. Rep. 374.

⁶¹ *Manufacturers' Accident Indemnity Co. v. Dorgan*, 58 Fed. 945, 16 U. S. App. 290, 7 C. C. A. 581, 22 L. R. A. 620. But prostration by heat is a disease. *Dozier v. Fidelity & Casualty Co. of New York* (C. C.) 46 Fed. 446. But insanity is not a bodily disease. *ACCIDENT INS. CO. v. CRANDAL*, 120 U. S. 527, 7 Sup. Ct. 685, 30 L. Ed. 740.

surer in case a real disease contributes directly or indirectly to the accident. Thus, in a recent Missouri case⁶² it was proved that the insured was delirious from an attack of grippe at the time he jumped from a hospital window and received the injury for which he brought suit. The court held that, even though it might be true that the accidental jump from the window was the proximate cause of the injury, the injury was yet at least indirectly due to the delirium of the disease, and therefore the insurer was held not liable.

VOLUNTARY AND UNNECESSARY EXPOSURE TO INJURY.

240. The exception of injuries due to voluntary and unnecessary exposure by the insured merely abrogates the rule that the insurer is liable for the consequences of the negligence of the insured, so far as they fall within the terms of his policy. This term merely requires the insured to exercise reasonable diligence in avoiding injury.

It is a familiar principle that the insurer assumes the risk of the insured's negligence, provided there be no bad faith on the part of the latter. Accident insurers, however, have essayed to change this rule, and to import into the insurance contract the doctrine of contributory negligence, by inserting a provision excepting themselves from liability for "injury or death caused by the voluntary exposure of the insured to unnecessary danger," or other words of similar effect. This exception merely imposes upon the insured the duty of exercising ordinary care in order to avoid sustaining any sort of injury. He is not required to exercise any unusual degree of care. As is well said by the Nebraska court,⁶³ in a case in which the proprietor of a pleasure resort injured himself by attempting to raise a very heavy dumbbell, in order to discover whether one of his performers was telling the truth as to its weight: "Accident insurance is not designed to furnish indemnity only in cases where the policy holder orders his conduct with grave circumspection and a provident foresight of consequences. Mere contributory negligence is no answer to an action on a contract of insurance. Neither is there any absolute inference that the lifting was unnecessary. According to the plaintiff's testimony, the act was the product of a reasonable motive, and was performed in the line of duty."

In order to come within the terms of this exception, the exposure must be not only voluntary—that is, intentional—but also must be unnecessary. Thus, the man who is injured in a fight which he could not avoid,⁶⁴ or a painter who is injured by a fall from the side of a

⁶² *Carr v. Insurance Co.*, 100 Mo. App. 602, 75 S. W. 180.

⁶³ *RUSTIN v. INSURANCE CO.*, 58 Neb. 792, 79 N. W. 712, 46 L. R. A. 253, 76 Am. St. Rep. 136, Woodruff, Ins. Cas. 294.

⁶⁴ *Collins v. Fidelity & Casualty Co.*, 63 Mo. App. 253.

house that he was painting,⁶⁶ while incurring voluntary danger, is yet entitled to recover, since the exposure was necessary.

While, to come within the language of this exception, it is necessary that the exposure shall be voluntary, an actual appreciation of the danger is not always necessary, provided the circumstances are such that a reasonable man would be aware of the danger. Thus, the act of walking along a railway track, even though the track was used as a passway, is a voluntary exposure to danger.⁶⁶ So is an attempt to cross a track before a rapidly approaching train;⁶⁷ but not the act of carefully crossing a railway track or a thoroughfare.⁶⁸ So, attempting to walk across a railway trestle on a dark night is within this exception;⁶⁹ but the act of the insured in stepping upon the floor of the bridge, which he had reason to think was safe, is not, although the insured fell through a hole in the bridge to his death beneath.⁷⁰ Standing on the open platform of a moving railway car is voluntary exposure to danger,⁷¹ but passing from one car to another in a vestibule train is not.⁷²

INTENTIONAL INJURY BY ANOTHER.

241. The terms excepting from the operation of the policy injuries intentionally inflicted by another are valid, but they will exempt the insurer only when the injury is not more extensive than the intent with which it was inflicted.

Injuries intentionally inflicted upon the body of the insured, either by his own hand while insane, or by that of another,⁷³ are deemed accidental, and chargeable to the insurer, unless excepted from the risks assumed, as is usually the case in the modern policy. The language of the exception is "injuries or death resulting from intentional injuries inflicted by the insured or another person."

In order that an injury shall come within this exception it is not

⁶⁶ *Matthes v. Association*, 110 Iowa, 222, 81 N. W. 484.

⁶⁷ *Lovell v. Insurance Co.* (Q. B. 1874) 3 Ins. Law J. 877.

⁶⁸ *Cornish v. Insurance Co.*, 23 Q. B. Div. 453.

⁶⁹ *Payne v. Association*, 119 Iowa, 342, 93 N. W. 361.

⁷⁰ *Follis v. Association*, 94 Iowa, 435, 62 N. W. 807, 23 L. R. A. 78, 58 Am. St. Rep. 408. See, also, *Travelers' Ins. Co. v. Jones*, 80 Ga. 541, 7 S. E. 83, 12 Am. St. Rep. 270.

⁷¹ *BURKHARD v. INSURANCE CO.*, 102 Pa. 262, 48 Am. Rep. 205.

⁷² *Travelers' Ins. Co. v. Randolph*, 78 Fed. 754, 24 C. C. A. 305; *Travelers' Ins. Co. v. Austin*, 116 Ga. 264, 42 S. E. 522, 59 L. R. A. 107, 94 Am. St. Rep. 125.

⁷³ *Robinson v. Society* (Mich.) 94 N. W. 211.

⁷⁴ When the person inflicting the injury is insane or so grossly intoxicated as not to be capable of forming an intention, the injury does not fall within this exception, and the insurer is liable. *Northwestern Benev. Soc. v. Dudley*, 27 Ind. App. 327, 61 N. E. 207.

necessary that it shall be inflicted with the consent of the insured; the intent of the other party to inflict the injury is sufficient. But the injury received must have been one that the other party intended to inflict,⁷⁴ or otherwise it would be accidental. For instance, if A. should shoot at B. and kill C., he would, in a criminal trial, be presumed to have intended to murder C., but the injury to C. would not be "intentionally inflicted," under the terms of an accident policy.⁷⁵ So, it has been held that, where the insured was shot by a robber, the insurer was held liable despite the presence of this clause, as there was no evidence that the robber intended to kill the insured.⁷⁶

OCCUPATION AND EMPLOYMENT.

242. An accident policy issued to the insured as being engaged in a specified occupation or employment does not cover injuries suffered by him while engaged in some other vocation, but it does cover such injuries as may be inflicted upon the insured while engaged in doing other incidental acts not in the line of the occupation specified.

Some accident policies grant insurance only against the risks of a certain specified occupation, while in other cases the insurance company may have classified the various occupations as more or less hazardous, and apportioned the amount of the indemnity to be paid in case of accident in accordance with this classification. In such cases it is usually provided that, when the insured is injured in an occupation classed as more hazardous than that in which he is insured, either there shall be no indemnity paid at all, or only the amount which is apportioned to the occupation in which the insured was engaged when he received the injury.

It is held by the authorities that the fact that the insured has had issued to him a policy describing him as engaged in a specified occupation, and denying any liability on the part of the insurer for injuries suffered while otherwise occupied, does not prevent the insured from being protected while doing those other acts, whether of business or pleasure, which are ordinarily incidental to one's existence in a civilized community. Thus, where the plaintiff was insured as a banker, he was allowed to recover for the loss of a hand suffered while trying to saw some boards which he intended to use in making a cabinet.⁷⁷ So,

⁷⁴ *Richards v. Insurance Co.*, 89 Cal. 170, 26 Pac. 762, 23 Am. St. Rep. 455; *Railway Officials' & Employees' Acc. Ass'n v. Drummond*, 56 Neb. 235, 76 N. W. 562.

⁷⁵ *Richards v. Insurance Co.*, supra.

⁷⁶ *Railway Officials' & Employees' Acc. Ass'n v. Drummond*, 56 Neb. 235, 76 N. W. 562.

⁷⁷ *Hess v. Association*, 112 Mich. 196, 70 N. W. 460, 40 L. R. A. 444.

another person who was insured as a teacher was allowed to recover when he was killed by falling from a barn which he was having built.⁷⁸ So, where a barber was out hunting and received an injury, he was not considered to have been hurt while engaged in the occupation of hunter.⁷⁹ The same rule has been applied in the case of similar injuries received by persons insured as grocer⁸⁰ and bookkeeper.⁸¹ In another case it was held, however, that where a man, who had obtained insurance as a "retired gentleman," was injured while operating a buzzsaw merely for the fun of it, he was not entitled to charge the consequences of his fun to the insurance company.⁸²

More Hazardous Employments.

The same principles, in effect, apply to those cases in which a less amount of indemnity is paid for an injury received while engaged in an employment classified as more hazardous than that in which the plaintiff was insured. In order that the payment may be reduced to that apportioned to the more hazardous occupation, it must be proved that the insured had engaged in that occupation as his regular vocation. The mere fact that he may have done some acts which are ordinarily done by persons of a certain vocation does not necessarily put him in that class. Thus, a person insured as a farmer, when injured while driving piles for a private bridge that he was building on his farm, was held not to be engaged in the occupation of a pile driver, and therefore not subject to have his indemnity cut down to the amount apportioned to the more hazardous occupation of pile driving.⁸³ But where a person insured as "importer and dealer in Chinese merchandise and contractor for Chinese labor," was injured while acting as foreman of a gang of Chinese laborers, it was held that the company was liable to pay only in accordance with the rating of the more hazardous employment of foreman, despite the fact that the agent of the insurer knew at the time of the issue of the policy that the insured was accustomed occasionally to act as such foreman.⁸⁴ So, where a person insured in the class of blacksmiths was killed while he was acting as a car coupler, an occupation more hazardous than that of black-

⁷⁸ *STONE'S ADM'RS v. CASUALTY CO.*, 34 N. J. Law, 371.

⁷⁹ *Willey Casualty Co. v. Sheppard*, 61 Kan. 351, 59 Pac. 651, 47 L. R. A. 650.

⁸⁰ *Kentucky Life & Accident Ins. Co. v. Franklin*, 102 Ky. 512, 43 S. W. 709.

⁸¹ *Holiday v. Association*, 103 Iowa, 178, 72 N. W. 448, 64 Am. St. Rep. 170. So of an insured merchant, injured while hunting. *Union Mut. Acc. Ass'n v. Frohard*, 134 Ill. 228, 25 N. E. 642, 10 L. R. A. 383, 23 Am. St. Rep. 664.

⁸² *Knapp v. Association*, 53 Hun, 84, 6 N. Y. Supp. 57.

⁸³ *National Acc. Soc. v. Taylor*, 42 Ill. App. 97.

⁸⁴ *Employers' Liability Assurance Corp. v. Back*, 102 Fed. 229, 42 C. C. A. 286.

smith, the liability of the insurer was reduced to that payable to car couplers.⁸⁵ In another case, where the insured was injured when riding home on his bicycle from a friend's funeral, taking a more circuitous route than was necessary, it was held that, as the indirect route was taken for recreation, he was entitled only to the indemnity payable to the class to which amateur bicyclists belong.⁸⁶ As a general rule, it is for the jury to determine whether the acts done by the insured, in any case, constitute engaging in the occupation in which these acts are usually done, or whether the acts are incidental and occasional.⁸⁷

A classification once made by the agent of the insurer, there being no circumstances of fraud on the part of the insured, is binding upon the insurer, though the classification may have been wrong on account of an error of the agent. Thus, a cattle dealer, who was accustomed occasionally to accompany his cattle when shipped by railway, was insured as belonging to the class of cattlemen not accompanying shipments, which occupation was regarded as less hazardous than that of another class designated as "cattle dealers accompanying shipments." The facts being fully stated to the agent, he classified the insured in the less hazardous class. The insured being subsequently injured while attending to some cattle that were being shipped, it was held that the company was liable to pay the sum due to the less hazardous class, it being bound by the mistaken classification of its agent.⁸⁸

INJURIES RECEIVED WHILE INTOXICATED.

243. Accident policies usually except injuries received by the insured while under the influence of intoxicants. This exception exempts the insurer from liability for any injury that may be sustained by the insured when in a condition of intoxication, whether his intoxication contributed to the injury or not.

As we have heretofore seen, there is some difference of opinion as to what constitutes "intemperance," within the meaning of the usual warranty of temperance in the life policy. There is likewise some difficulty in deciding when the insured is to be considered "under the influence of intoxicating drinks,"⁸⁹ within the terms of the exception

⁸⁵ *Standard Life & Accident Ins. Co. v. Taylor*, 12 Tex. Civ. App. 386, 34 S. W. 781.

⁸⁶ *Eaton v. Insurance Co.*, 89 Me. 570, 36 Atl. 1048.

⁸⁷ *Eggenberger v. Association (C. C.)* 41 Fed. 172; *Tucker v. Insurance Co.*, 56 Hun, 50, 4 N. Y. Supp. 505.

⁸⁸ *Pacific Mut. Life Ins. Co. v. Snowden*, 12 U. S. App. 704, 58 Fed. 342, 7 C. C. A. 264. Compare *Employers' Liability Assur. Corp. v. Back*, 102 Fed. 229, 42 C. C. A. 286.

⁸⁹ It is well settled that the phrase "under the influence of intoxicating

ordinarily incorporated in every accident policy. Courts have always found difficulty in deciding when a man is to be considered drunk, but for the purpose of the insurance policy it is considered that the insured is under the influence of intoxicating liquor when he has so far indulged himself as to render himself incapable of that deliberate exercise of all of his faculties, for the purpose of protecting himself from injury, upon which the insurer reasonably relies.⁹⁰

In a leading case⁹¹ the insured partook too freely of intoxicants during the course of a dinner with a convivial friend. The conversation chanced to turn upon shooting, whereupon the friend offered to make good his boast of skill in shooting, by shooting the ear of the insured without hitting him otherwise. The insured, while not too drunk to stand erect, was not sober enough to decline the proposition. His friend's skill had evidently forsaken him in the midst of his cups, for the result of the trial was that the bullet, instead of piercing the ear of the insured, struck him fairly in the forehead, killing him instantly. The New York court held very reasonably that the insured was brought to his death while intoxicated, and therefore that there could be no recovery under the policy.

It is not necessary, however, that the intoxication of the insured shall in any wise have contributed to his injury. If he was intoxicated at the time of receiving the injury, he loses his right to claim indemnity from the insurer, even though there was no causal relation between the intoxication and the injury.⁹²

LIABILITY OF THE INSURER—TOTAL DISABILITY.

244. The liability of the insurer is fixed exclusively by the terms of the policy. Total disability, upon which certain payments are usually conditioned, exists, as a general rule, when the injury is such as to prevent the insurer from engaging in his customary occupation. This rule, however, may be varied by the terms of the contract.

drinks," as used in accident policies, has the legal significance of "drunk" or "intoxicated." *Standard Life & Accident Ins. Co. v. Jones*, 94 Ala. 434, 10 South. 530.

⁹⁰ *SHADER v. ASSURANCE CO.*, 66 N. Y. 441, 23 Am. Rep. 65, affirming 3 Hun (N. Y.) 424, 5 Big. Ins. Cas. 331. In this case the court thus expresses the reason of this provision: "Accidental policies are issued principally to travelers or persons exposed to unusual peril and danger, and, the risk in such cases being extremely hazardous, it is by no means unreasonable that the insurer should require that the insured should be under no exciting influence which may affect his self-possession or judgment, or seriously interfere with the free, full, and deliberate exercise of his faculties in protecting himself from accident or harm."

⁹¹ *SHADER v. ASSURANCE CO.*, *supra*.

⁹² See *SHADER v. ASSURANCE CO.*, *supra*; *Standard Life & Accident Ins. Co. v. Jones*, 94 Ala. 434, 10 South. 530.

Loss of a Member.

Granting that the policy is once validly issued, the measure of the insurer's liability depends solely upon its terms, no embarrassing questions of indemnity being allowed to arise.⁹³ The extent of the insurer's liability for any one of the innumerable injuries which a mortal may sustain varies almost infinitely with the character of the injury under the terms of the policy. Therefore, any general discussion of the liability of the insurer will, for the most part, be useless, just as a particular discussion of individual cases would be at once tedious and profitless. Two general cases, however, may be properly noted. Where the insurer agrees to pay a certain sum in case of the loss of a member, or of members, as of "one entire hand," or "sight in both eyes," etc., it is not necessary, in order that the member shall be lost, within the meaning of this phrase, that it shall be severed or separated from the body. If it is so injured as to be practically useless to the insured, it is to be deemed entirely lost. Thus, where a man received an accidental gunshot wound in the spine, causing paralysis of the lower limbs, it was held that he suffered an entire loss of both his legs.⁹⁴ Again where a one-eyed man had that eye knocked out, he was held to have lost the sight of both eyes, within the terms of his policy.⁹⁵

Total Disability.

Much litigation has arisen in determining when the insured shall be deemed to have been "totally disabled," within the terms of the usual accident policy. Of course, there may be qualifying phrases coupled with the one in question, which will more or less clearly indicate its definition in particular cases. For instance, where it is stipulated that, in order to recover, the insured shall be disabled from carrying on "all kinds of business,"⁹⁶ or that the injury shall cause a "total inability to labor,"⁹⁷ in such cases the limiting adjuncts should receive a reasonable construction.

But where the provision is for a certain payment in case of mere

⁹³ Of course, the policy may stipulate for liability measured by actual loss to the insured, as where "the money value" of the insured's time loss was fixed as the limit of his recovery. *Bean v. Insurance Co.*, 94 Cal. 581, 29 Pac. 1113.

⁹⁴ *Sheamon v. Insurance Co.*, 77 Wis. 618, 46 N. W. 799, 9 L. R. A. 685, 20 Am. St. Rep. 151.

⁹⁵ *Humphreys v. Association*, 139 Pa. 214, 20 Atl. 1047, 11 L. R. A. 564.

⁹⁶ *Lyon v. Assurance Co.*, 46 Iowa, 631. For an interesting case in which an attempted restriction of this kind was turned against the insurer in a most surprising fashion, see *YOUNG v. INSURANCE CO.*, 80 Me. 244, 13 Atl. 896.

⁹⁷ Total inability to labor does not exist so long as the injured person is capable of doing any labor whatever by which he could earn a livelihood. *Baltimore & Ohio Employés' Relief Ass'n v. Post*, 122 Pa. 579, 15 Atl. 885, 2 L. R. A. 44, 9 Am. St. Rep. 147.

total disability, or total disability to engage in his usual occupation, it is generally held that such total disability exists when the insured is so injured as to be incapable of safely and efficiently engaging in his usual employment. It necessarily follows, therefore, that the extent of the injury necessary to cause total disability will vary greatly with the character of the employment. Thus, where an active solicitor was so injured as to be confined to his room, so that he was unable personally to attend to the business of his clients, he was held to be totally disabled, although he was able to conduct his correspondence and to direct his clerks.⁹⁹ So, a surgeon would be totally disabled by the loss of an arm, since it would be practically impossible for him to perform surgical operations without the use of both; but a druggist, having lost one arm, could carry on his business very well with the other, and therefore was not totally disabled.¹⁰⁰

In order to be totally disabled it is not necessary that the insured should be wholly incapable of doing any acts at all in furtherance of his business interests. He might be capable of doing single, inconsiderable acts in connection with his business, and yet be wholly unable to conduct it efficiently.¹⁰¹ So, the insured will be held to be totally disabled if considerations of prudence would require him to refrain from carrying on his business, even though he might be physically capable of conducting it, though at the risk of his health.¹⁰²

RIGHT TO AN AUTOPSY.

245. The right reserved in accident policies to the insurer to demand an autopsy in case of alleged accidental death is not absolute, but one to be exercised reasonably, with due consideration to all the circumstances of the case.

In order to avoid fraudulent claims, most accident policies contain a stipulation that, upon demand by the insurer, the body of the insured shall be subject to examination by the medical examiner of the insurer, and that, if demand is made, the insurer shall be permitted to hold an autopsy upon the body of the deceased insured. Such a provision is reasonable, and well calculated for the proper protection of the insurer. It will, therefore, be enforced, provided it is claimed

⁹⁹ *Hooper v. Insurance Co.*, 5 H. & N. 546, 7 Jur. (N. S.) 73. But an attorney is not totally disabled by losing the use of one hand. *United States Mut. Acc. Ass'n v. Millard*, 43 Ill. App. 148.

¹⁰⁰ *Smith v. Supreme Lodge*, 62 Kan. 75, 61 Pac. 416.

¹⁰¹ *Turner v. Fidelity & Casualty Co.*, 112 Mich. 425, 70 N. W. 898, 38 L. R. A. 529, 67 Am. St. Rep. 428; *Lobdill v. Association*, 69 Minn. 14, 71 N. W. 696, 38 L. R. A. 537, 65 Am. St. Rep. 542.

¹⁰² *YOUNG v. INSURANCE CO.*, 80 Me. 244, 13 Atl. 896; *Lobdill v. Association*, 69 Minn. 14, 71 N. W. 696, 38 L. R. A. 537, 65 Am. St. Rep. 542.

under reasonable circumstances.¹⁰³ The insurer, if desiring an autopsy, must make his demand within a reasonable time, and of the proper person. As a general thing, if he delays making such a demand until after the burial of the corpse, he will be deemed to have forfeited his right.¹⁰⁴ Reasons, both of sentiment and public policy, would prohibit the insurer from making a tardy demand for an autopsy that could be complied with only by exhuming the buried body. If, however, circumstances awakening suspicion of fraud come to the knowledge of the insurer only after interment has taken place, it seems that he may insist upon the exhuming and dissection of the body, especially if the collateral proof of fraud is strong.¹⁰⁵

¹⁰³ See *Tompkins v. Insurance Co.*, 53 W. Va. 479, 44 S. E. 439, 62 L. R. A. 489.

¹⁰⁴ *American Employers' Liability Ins. Co. v. Barr*, 32 U. S. App. 444, 68 Fed. 873, 16 C. C. A. 51. In this case the demand was made several weeks after burial, and of the widow of the deceased, rather than of the beneficiary. *Ewing v. Association*, 55 App. Div. 241, 66 N. Y. Supp. 1056; *Wehle v. Association*, 153 N. Y. 116, 47 N. E. 35, 60 Am. St. Rep. 598.

¹⁰⁵ *Wehle v. Association*, *supra*.

CHAPTER XVII.

GUARANTY, CREDIT, AND LIABILITY INSURANCE.

- 246. In General.
- 247-248. Fidelity and Guaranty Insurance.
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IN GENERAL.

246. The rights of the parties to contracts for the special kinds of insurance recently developed are to be determined in accordance with the terms of each contract, construed in the light of the purpose for which it was made, and according to the general rules of insurance law.

Reference has already been made, in considering the development of the practice of insurance, to the remarkably rapid extension within recent times of the principles of insurance to almost every important commercial or industrial enterprise the conduct of which necessarily subjects those concerned in it to risk of loss from fortuitous causes. Thus special contracts are now made insuring against loss by lightning, hail, floods, tornado or other windstorm, or by failure of crops. Many of these special insurances have assumed sufficient importance to have received special names that are fast becoming familiar not only to the lawyer, but to the general public as well. Live stock insurance protects the owners of live stock against damage or loss by lightning or disease; boiler insurance, against the injurious consequences of boiler explosions; title insurance, against defects in or failure of title to real estate;¹ rent insurance, against loss by reason of the failure of tenants to pay rent; burglar insurance, against loss by burglary; and plate-glass insurance against all the evils that may befall that fragile but costly kind of property. Probably the latest of these special forms of insurance is strike insurance, devised for the

¹ Title insurance: The business of insuring titles of real estate to purchasers or mortgagees has become very extensive, every considerable city having one or more title companies, which unite the business of examining titles with that of insuring them. The thoroughness that characterizes the work of these companies is attested by the remarkably small number of cases involving title insurance that are to be found in our reports. The usual terms and general scope of title insurance contracts may be seen in the following cases: *Place v. Trust Co.*, 67 Minn. 126, 69 N. W. 700, 64 Am. St. Rep. 404; *Stensgaard v. Insurance Co.*, 50 Minn. 429, 62 N. W. 910, 17 L. R. A. 575; *Wheeler v. Trust Co.*, 160 Pa. 408, 28 Atl. 849.

purpose of protecting employers of labor from losses that may be caused by strikes among their employés.

But the special insurances which are most important and popular, as answering a more generally recognized need, are fidelity and guaranty insurance, intended to protect employers against the consequences of the dishonesty of employés; liability insurance, against liability incurred by masters or passenger carriers on account of personal injuries suffered by servants or passengers; and credit insurance, against loss to merchants from bad debts. Only these three forms last mentioned are of sufficient importance at the present time to justify special treatment in such a work as this. The oldest and most important kind of special insurance, accident insurance, has already been separately treated.

General Principles of Construction.

Contracts for these kinds of insurance often assume forms very different from that of the conventional insurance policy, and bear names suggestive of other commercial contracts. Thus a contract of fidelity or guaranty insurance may be set forth in an instrument bearing the form of an ordinary official bond, while another writing purporting to be a contract of conditional sale may prove to be a contract of credit² insurance or of crop³ insurance. But whatever be the outer form of such contracts, the courts always look to their inner nature, and if they are found in reality to be agreements "by which one party for a consideration promises to pay money or its equivalent, or to do some act of value to the assured, upon the destruction or injury of something in which the other party has an interest,"⁴ they are declared to be contracts of insurance, and subject in their making to all the laws regulating insurance. Thus in a recent Massachusetts case a contract whereby one party agreed to purchase at a fixed price all the accounts which the other should have, during a designated period, against certain defined insolvent debtors, or judg-

² *Clafin v. Credit System Co.*, 165 Mass. 501, 43 N. E. 293, 52 Am. St. Rep. 528; *Shakman v. Credit System Co.*, 92 Wis. 366, 66 N. W. 528, 32 L. R. A. 383, 53 Am. St. Rep. 920; *Robertson v. Credit System Co.*, 57 N. J. Law, 12, 29 Atl. 421.

³ See *State v. Hogan*, 8 N. D. 301, 78 N. W. 1051, 45 L. R. A. 166, 73 Am. St. Rep. 759. In this case it was held that a contract whereby a farmer, by the payment of a certain sum, purchased an option to sell the produce of certain described farm lands at \$5 an acre, was one of guaranty insurance, and that the corporation engaged in making such contracts should comply with all the requirements of the state insurance laws.

⁴ This definition of a contract of insurance, first given in *COMMONWEALTH v. WETHERBEE*, 105 Mass. 149, 160, was adopted by the Massachusetts insurance act of 1887 (St. 1887, c. 214, § 3). And see *Clafin v. Credit System Co.* supra.

ment debtors, against whom execution should have been returned unsatisfied, was held to be an insurance contract.⁵

Being thus insurance contracts, these agreements are subject to the same general rules of law that have already been discussed as applicable to fire, marine, and life insurance, although there are to be found in the cases occasional intimations that the courts will be loath to apply to these new kinds of insurance the arbitrary technical rules that have so often operated to embarrass the courts and to defeat just claims under policies of insurance of the older kinds.⁶

Contracts Construed in Favor of Insured.

Probably the most important general rule guiding the courts in the construction of insurance policies is that all doubt or uncertainty as to the meaning of the contract shall be resolved in favor of the insured. This rule, it is well settled, applies in full force to these contracts of special insurance,⁷ which, unfortunately for both insurer and insured, are often filled with numerous conditions, the legal significance and economic purpose of which are alike uncertain, as was the case with life policies a quarter of a century ago. Such a contract was thus commented on by the North Carolina Supreme Court in a recent case:⁸ "One of these conditions is as follows: 'And, lastly, should the employé become a defaulter and seek refuge in any foreign country, he hereby agrees to the enforcement against him of the laws of such country, as they are now or may be hereafter enacted, relative to the commission of injuries or offenses against an employer resident in

⁵ *Clafin v. Credit System Co.*, 165 Mass. 501, 43 N. E. 293, 52 Am. St. Rep. 528. The same contract was similarly construed in the other cases cited in note 1, supra.

⁶ Thus, in *Guarantee Co. of North America v. Trust Co.*, 80 Fed. 766, 26 C. C. A. 146, it is said: "Marine, fire, or life insurance against the destructive forces of nature is not quite the same thing as an insurance against the dangers of dishonesty; and the courts must interpret the contracts in view of this difference, applying the words used to the purpose of covering the peculiarities of the risk assumed on the one hand, and on the other intended to be discarded or shifted to others. And if these new contracts, whatever their form, are to be turned into contracts of insurance, the courts will be careful not to again perplex themselves with regrettable technicalities of law, such as have sometimes crept into the older contracts of insurance, and have required statutes for their removal."

⁷ *Mechanics' Sav. Bank & Trust Co. v. Guarantee Co. (C. C.)* 68 Fed. 459; *Shakman v. Credit System Co.*, 92 Wis. 366, 66 N. W. 528, 32 L. R. A. 383, 53 Am. St. Rep. 920; *American Surety Co. v. Pauly*, 170 U. S. 144, 18 Sup. Ct. 552, 42 L. Ed. 977; *American Credit Indemnity Co. v. Cassard*, 83 Md. 272, 34 Atl. 703. And see, especially, *Bank of Tarboro v. Deposit Co.*, 126 N. C. 320, 35 S. E. 588, 83 Am. St. Rep. 682; s. c. on rehearing, 128 N. C. 366, 38 S. E. 908, 83 Am. St. Rep. 682.

⁸ *Bank of Tarboro v. Deposit Co.*, 126 N. C. 320, 35 S. E. 588, 83 Am. St. Rep. 682.

such country.' How an agreement between private parties can affect the criminal laws of a foreign country we fail to comprehend, and we are glad the question is not before us. We allude to it only to show the complicated nature of the conditions injected into bonds of indemnity which often tend to defeat the primary object of the contract. The old bond of indemnity was a simple instrument, which could be easily comprehended and promptly enforced. If these new forms of contract are to take its place, we hope they will preserve some of its simplicity and efficiency. This is a matter of great importance, as surety companies are now allowed to make the bonds of trustees, guardians, administrators, and all other fiduciaries; and we would much regret to see the rights of orphan children, as well as other helpless beneficiaries, depend not upon the substantial merits of their case, but upon a multitude of technicalities in an instrument to which they were not parties."⁹

But this rule of construction favoring the insured will not be carried so far as to make a new contract for the parties. It has no room for application when rights under the contract as written are clear. Thus in a recent Massachusetts case¹⁰ the defendant had insured the plaintiff railway company "against loss from liability to every person who may, during a period of twelve months" from a specified date, "accidentally sustain bodily injuries while traveling on any railway of the insured, or while in a car or upon the railway bed or other property of the insured, under circumstances which shall impose upon the insured a common-law or statutory liability for such injuries." The insured became liable to the administrator of a passenger who was instantly killed while on one of its cars, and sought indemnity from the insurer. The court, however, held that, as the insurer had promised indemnity only for liability to the person injured, the insured could not make legal claim for indemnity against liability to the injured person's administrator, whose right of action, given only by statute, was original and distinct, and not a surviving right. While the plaintiff was doubtless surprised to learn from the court what a peculiar contract it had made, the decision appears to be sound.

⁹ The principle underlying the rule that all presumptions are in favor of the validity of a contract of insurance is thus forcibly put in a second appeal of the *Bank of Tarboro Case* (128 N. C. 366, 38 S. E. 908, 83 Am. St. Rep. 682): "The object of an indemnifying bond is to indemnify; and if it fails to do this, either directly or indirectly, it fails to accomplish its primary purpose, and becomes worse than useless. It is worthless as an actual security, and misleading as a pretended one."

¹⁰ *Worcester & S. St. R. Co. v. Insurance Co.*, 180 Mass. 263, 62 N. E. 364, 57 L. R. A. 629, 91 Am. St. Rep. 275. See, also, *People's Ice Co. v. Assurance Corp.*, 161 Mass. 122, 86 N. E. 754; *Phillipsburg Horse Car Co. v. Fidelity Co.*, 160 Pa. 350, 28 Atl. 823.

Good Faith Required of the Parties.

As in the case of other insurances, the parties to these contracts of special insurance must exercise the highest degree of good faith in dealing with each other. It has been intimated in some of the cases that the parties to these new insurances contract with each other at arm's length,¹¹ but this is certainly not the case. Thus it has been held that the failure of the employer to inform the surety company of previous known acts of dishonesty on the part of the employé discharged the fidelity bond given in ignorance of such dishonesty.¹² That is to say, the insured owes to the insurer in such cases the duty of making full disclosure of all facts known by him to be material to the risk which the insurer proposes to assume. Likewise it is the duty of the insured to inform the surety-insurer of any occurrences during the currency of the insurance which will materially increase the risk, such as embezzlement, or other acts of the employé concerned that involve moral turpitude.¹³

Proofs of Loss.

The same rules that have already been discussed as applying to requirements of proofs of loss found in the more familiar kinds of insurance policies, also apply to similar requirements that usually appear in contracts for these special kinds of insurance. Thus the requirement of "immediate notice" of an injury entailing liability, usually found in employers' liability insurance policies, is satisfied by giving notice within a reasonable time.¹⁴

¹¹ See *Guaranty Co. of North America v. Trust Co.*, 80 Fed. 766, 26 C. C. A. 146.

¹² *Capital Fire Ins. Co. v. Watson*, 76 Minn. 387, 79 N. W. 601, 77 Am. St. Rep. 657; *Lancashire Ins. Co. v. Callahan*, 68 Minn. 277, 71 N. W. 261, 64 Am. St. Rep. 475.

¹³ See *Lancashire Ins. Co. v. Callahan*, *supra*.

¹⁴ *Ward v. Casualty Co.*, 71 N. H. 262, 51 Atl. 900, 93 Am. St. Rep. 514; *Columbia Paper Stock Co. v. Casualty Co.* (Mo. App.) 78 S. W. 320; *Mandell v. Casualty Co.*, 170 Mass. 173, 49 N. E. 110, 64 Am. St. Rep. 291; *Trippe v. Society*, 140 N. Y. 23, 35 N. E. 316, 22 L. R. A. 432, 37 Am. St. Rep. 529.

All conditions requiring notice must of course be construed with reference to the purpose for which they are inserted. Thus a condition in a live stock insurance policy requiring telegraphic notice to the insurer in every case of sickness of an animal insured was held not to be broken by failure to give notice of a slight sickness of only a few moments duration. *Kells v. Insurance Co.*, 64 Minn. 390, 67 N. W. 215, 58 Am. St. Rep. 541.

FIDELITY AND GUARANTY INSURANCE.

247. **DEFINITION**—A contract of fidelity and guaranty insurance is one whereby the insurer, for a valuable consideration, agrees, subject to certain conditions, to indemnify the insured against loss consequent upon the dishonesty or default of a designated employé.

248. The contract partakes of the nature both of insurance and of suretyship. Hence, even in the absence of contract stipulations to such effect, the contract is avoided by the failure of the insured to disclose to the insurer, at the time of making the contract, any known previous acts of dishonesty on the part of the employé, or any dishonest practices that may occur during the currency of the policy. But the insured is not required to give notice of mere irregularities not involving moral turpitude; nor, in the absence of agreement to that effect, does the insured owe to the insurer any duty of watching the conduct and accounts of the employé concerned.

The term "fidelity and guaranty insurance," or, in its more abbreviated and frequent form, "guaranty insurance," is sometimes held to include contracts guarantying titles to real estate and the solvency of debtors, as well as those granting indemnity for losses suffered by reason of the infidelity or dishonesty of employés.¹⁵ Here, however, only the latter kind of contracts will be treated under this title, the other contracts being considered under the subsequent specific titles of "credit insurance" and "title insurance."

Guaranty Insurance Subject to Principles of Suretyship.

The insurance contract, in its general form strikingly analogous to the contract of suretyship, becomes almost identified with it in the form of guaranty insurance. Indeed, the principal reason for the existence of the contract of guaranty insurance is its substitution for the older official and fiduciary bonds with their personal sureties; and to this day guaranty insurance contracts are drawn in the form of bonds, and are ordinarily so called. These bonds of incorporated fidelity and guaranty companies are generally regarded as more efficient than the personal bond with sureties, since there is much less danger of the corporate surety's becoming insolvent, and because public policy is better conserved, in the case of criminal default of the principal, by the relentless prosecution carried on by the corporate surety, who is usually unaffected by those considerations of sentiment and local expediency which frequently induce personal sureties to shield a criminal principal from the punishment that should be visited upon

¹⁵ And, see, *State v. Hogan*, 8 N. D. 301, 78 N. W. 1051, 45 L. R. A. 166, 73 Am. St. Rep. 759, in which a contract guarantying crop returns was called guaranty insurance.

him. In many states statutes have been passed expressly authorizing the acceptance of these fidelity bonds for all officers and fiduciaries instead of the personal bonds formerly required.¹⁶ Such legislative recognition of the value of guaranty insurance renders the courts even less patient of technical rules and unnecessary conditions in these contracts that tend unfairly to defeat the indemnity contemplated by the parties, than might otherwise have been the case. While there are, as yet, few cases construing these contracts, it is clear that the courts will go far to prevent them from affording less protection than the old personal bonds which they have displaced.¹⁷ But it is settled that guaranty insurance contracts, when properly executed, are valid, and not contrary to public policy as tending to reduce the care which employers customarily exercise in selecting honest employes.¹⁸

Duty of Diligence on Part of Insured.

In the absence of contract to that effect, there is no obligation on the part of the insured to watch over the conduct of his employé, and his failure to detect instances of dishonesty, even though clearly negligent, will not, in the absence of bad faith, afford a ground of defense to the insurer.¹⁹ But, in accordance with a well-settled rule applicable to suretyship, the insured must promptly communicate to the insurer any actual information he may have acquired of any dishonest acts done by the employé, whose fidelity is insured, in the course of his employment; and failure to impart such information will discharge the insurer, just as it would any other surety.²⁰ But in order that the insurer may be thus discharged, the employer must have had actual knowledge of the employé's dishonesty; mere suspicion is not enough.²¹ Further, the rule applies only to acts involv-

¹⁶ See *Bank of Tarboro v. Deposit Co.*, 126 N. C. 320, 35 S. E. 588, 83 Am. St. Rep. 682.

¹⁷ "It would be contrary to public policy to inconsiderately allow the protection afforded by this new insurance to the vast business interests of the country, in public administration as elsewhere, to be endangered by any lesser indemnity than that of the old form by bond, which is being so rapidly displaced, the new contracts being offered by the companies as superior to the old in safety." *Guarantee Co. of North America v. Trust Co.*, 80 Fed. 766, 26 C. C. A. 146.

¹⁸ *FIDELITY & CASUALTY CO. v. EICKHOFF*, 63 Minn. 170, 65 N. W. 351, 30 L. R. A. 586, 56 Am. St. Rep. 464.

¹⁹ *Fidelity & Casualty Co. v. Bank*, 97 Ga. 634, 25 S. E. 392, 33 L. R. A. 821, 54 Am. St. Rep. 440; *Guarantee Co. of North America v. Trust Co.*, 80 Fed. 766, 26 C. C. A. 146.

²⁰ *Capital Fire Ins. Co. v. Watson*, 76 Minn. 387, 79 N. W. 601, 77 Am. St. Rep. 657; *Lancashire Ins. Co. v. Callahan*, 68 Minn. 277, 71 N. W. 261, 64 Am. St. Rep. 475; *Saint v. Manufacturing Co.*, 95 Ala. 362, 10 South. 539, 36 Am. St. Rep. 210; *Phillips v. Foxall*, L. R. 7 Q. B. 666.

²¹ *American Surety Co. v. Pauly*, 170 U. S. 144, 18 Sup. Ct. 552, 42 L. Ed. 977.

ing moral turpitude, in which case the failure of the insured to inform the insurer of those facts that show the risk to be greater than that contemplated by the parties when making the contract will amount to bad faith. The insured is under no obligation, in the absence of contract, to report mere irregularities or neglect on the part of his employé, not involving dishonesty, so long as there is no bad faith.²²

In most guaranty insurance contracts, however, it is specifically stipulated that notice shall be given to the insurer of irregularities as well as dishonesty of the employé, when known to the insured. In such cases this requirement must be strictly complied with before the insurer's liability becomes fixed.²³

Knowledge of Co-Employé not Imputed to Employer.

In the stipulations just referred to provision is made for the communication of such acts of dishonesty as come to the knowledge of the "employer."²⁴ Since, however, the employers so insured are usually corporations, it is often difficult to say when any specific acts of dishonesty on the part of the employé have come to the knowledge of the corporate employer. Plainly the knowledge of the peculating employé cannot be imputed to the corporate employer, on the well-known principle that the law will not presume that an agent will communicate to his principal information that would prove prejudicial to his own interests.²⁵ But an equally well settled rule of law is that, in the absence of such hostile interest in the agent, the principal is charged with all knowledge acquired by the agent in so far as it affects those matters intrusted by the principal to the agent. Applying this rule

²² *Atlantic & P. Tel. Co. v. Barnes*, 64 N. Y. 385, 21 Am. Rep. 621; *Charlotte, C. & A. R. Co. v. Gow*, 59 Ga. 685, 27 Am. Rep. 403; *Watertown Fire Ins. Co. v. Simmons*, 131 Mass. 85, 41 Am. Rep. 196; *Richmond & P. R. Co. v. Kasey*, 30 Grat. (Va.) 218. But, see, *Ida County Sav. Bank v. Seidensticker* (Iowa) 92 N. W. 862.

²³ *Guarantee Co. of North America v. Trust Co.*, 80 Fed. 766, 26 C. C. A. 146; *Harbour Com'rs v. Guarantee Co.*, 22 Can. Sup. Ct. Rep. 542. In the former case it was held that a policy which stipulated that the employer should notify the insurer of any speculation in which the employé might engage, to the knowledge of the employer, was not avoided by failure of the employer to give notice to the insurer of speculation in which it was learned the employé had formerly been engaged, but which was honestly, though mistakenly, believed to have been discontinued.

²⁴ A typical form of this condition is as follows: "This bond will become void as to any claims which may arise subsequent to the occurrence of any act on the part of the employé, involving loss, for which the company is responsible hereunder to the employer, if the employer shall fail to notify the company of the occurrence of such act at the earliest practicable moment after it shall have come to the knowledge of the employer, and on receipt of such notice the company shall have the right immediately to cancel the bond as to subsequent acts or defaults."

²⁵ *American Surety Co. v. Pauly*, 170 U. S. 144, 18 Sup. Ct. 552, 42 L. Ed. 977.

to the ordinary case of a corporate employer, a banking corporation, for example, we should expect to find the cases to hold that knowledge by one employé of dishonest practices on the part of a co-employé of relatively the same rank would not affect the employer, but that where an employé of superior rank discovered instances of dishonesty among co-employés of subordinate rank, who were under his authority and control, and over whose conduct of the affairs of the corporation he exercised supervisory powers, such knowledge would necessarily be imputed to the corporation, provided, of course, such superior officer were not an accomplice in the wrongdoing. Thus it would seem clear that the knowledge of the bookkeeper that the teller was misappropriating the funds of the bank would not affect the bank with notice of that fact, since the duty of the bookkeeper is to keep books, and not to keep watch upon the teller. But a similar knowledge on the part of the cashier, it would seem, should bind the bank, irrespective of his fidelity in communicating it, since it is the duty of the cashier, on behalf of the bank, to supervise the conduct of the teller as well as of his other assistants and subordinates. But while there is some authority²⁶ for the view thus suggested, it seems, so far as a rule may be deduced from the few cases in which such a provision has come before the courts for construction, to be held broadly that the knowledge of one employé of dishonest acts done by a co-employé is not to be imputed to the employer so as to defeat the rights of the employer as against the insurer.²⁷ Many of the cases, however, that are cited in support of the rule thus broadly stated, in reality merely decide that, where the cashier or other superior officer participates in the wrongdoing of the subordinate employé, the former's knowledge of the wrongdoing is not chargeable to the employer, which is manifestly correct within the adverse interest rule stated above, as the superior officer could hardly be expected to expose the crime to which he was an accomplice. But there is undoubtedly a tendency to introduce an exception to the rule of agency stated above, in order to increase the protection afforded to banks and similar institutions by fidelity bonds.²⁸ But to press the doctrine as

²⁶ *Saint v. Manufacturing Co.*, 95 Ala. 362, 10 South. 539, 36 Am. St. Rep. 210; *McShane v. Howard Bank*, 73 Md. 135, 20 Atl. 776, 10 L. R. A. 552.

²⁷ *Fidelity & Casualty Co. v. Bank*, 97 Ga. 634, 25 S. E. 392, 33 L. R. A. 821, 54 Am. St. Rep. 440; *Pittsburg, Ft. W. & C. Ry. Co. v. Shaeffer*, 59 Pa. 350; *Taylor v. Bank*, 2 J. J. Marsh. (Ky.) 564. This doctrine applies with peculiar force to government officers. See *Jones v. United States*, 18 Wall. (U. S.) 662, 21 L. Ed. 867.

²⁸ *Sharswood, J.*, in *Pittsburg, Ft. W. & C. Ry. Co. v. Shaeffer*, *supra*, argues thus powerfully in favor of this doctrine: "Corporations can only act by officers and agents. They do not guaranty to the sureties of one officer the fidelity of the others. The rules and regulations which they may establish in regard to periodical returns and payments are for their own security, and not for the benefit of the sureties. The sureties, by executing the bond, become

stated in the Georgia case²⁹ to its logical conclusion would render the stipulation in question meaningless in all cases in which the insured employer was incorporated. It is as impossible for a corporation to know anything as it is for it to do anything save through some agent of high or low degree. If it be true that no agent whatever can acquire such notice of another agent's infidelity as will be chargeable to the metaphysical corporate principal, the condition of the insurer of such corporate employés is hazardous indeed.

LIABILITY OF THE GUARANTY INSURER.

249. The liability of the guaranty insurer, determined in accordance with the provisions of the policy, is, within the limit of the sum written in the policy, measured by the amount of actual loss suffered by the insured.

250. SUBROGATION—Upon payment of a loss caused by a default insured against, the insurer has a common-law right to be subrogated to all rights and claims of the insured against the defaulting employé by which such default may be made good.

Whether the guaranty insurer is liable for any specific loss that falls upon the employer through the dishonesty of his employé depends, of course, upon whether that loss comes within the terms of the con-

responsible for the fidelity of their principal. It is no collateral engagement into which they enter, dependent on some contingency or condition different from the engagement of their principal. They become joint obligors with him in the same bond, and with the same condition underwritten. The fact that there were other unfaithful officers and agents of the corporation who knew and connived at his infidelity ought not in reason, and does not in law or equity, relieve them from the responsibility for him. They undertake that he shall be honest, though all around him are rogues. Were the rule different, by the conspiracy of the officers of a bank or other moneyed institution, all their sureties might be discharged. It is impossible that a doctrine leading to such consequences should be sound."

²⁹ *Fidelity & Casualty Co. v. Bank*, 97 Ga. 634, 25 S. E. 392, 33 L. R. A. 821, 54 Am. St. Rep. 440, in which the doctrine is thus stated: "The above authorities will suffice to show that the doctrine of constructive notice has no application to transactions such as that in the present case. Not having required the bank to insure the fidelity of all its other employés as a condition precedent to recovery on Redwine's bond, the company cannot take advantage of the failure of duty on the part of one of the bank's employés. Undoubtedly it was the duty of McCandless, the cashier, to inform the bank as to any misdoings of Redwine of which he knew. This was, however, a duty he owed the bank, and not the company, which could only derive a benefit therefrom by express stipulation in its contract to the effect that it should be entitled to have such duty of McCandless to the bank faithfully performed. The bank suffered from such neglect to a far greater extent than did the company, whose liability under its bond was limited in amount, and surely the bank is not equitably estopped from claiming a benefit under the bond which it expressly stipulated for."

tract as reasonably construed, all doubts being resolved in favor of the insured. These fidelity contracts vary so greatly in their terms, and the cases construing them are so few, that no rules of construction having general application can safely be deduced. We may, however, profitably note some of the more frequently occurring terms.

The insurance is usually against the dishonesty of employes, and therefore does not cover losses due to the negligence, incompetence, or lack of sound discretion on the part of the employe.⁸⁰ But the guaranty may include losses attributable to mere negligence. Under such a contract it was held that when a bonded railway agent negligently left a large sum of the insured railway company's money in an insecurely locked room, whence it was stolen during his absence, the railway company was entitled to indemnity from the insurer.⁸¹

Period of Risk.

Since defalcations by employes and other fiduciaries are usually so well concealed as not to be discovered for a considerable time after they are committed, and frequently not until the defaulter has quit the service that he abused, it is customary for guaranty insurance contracts to specify that the insurer shall be liable only for those defaults that may occur during the currency of the bond and are discovered within a specified period, usually six months, after the defaulting employe quits the service of the insured, or after the expiration of the bond. Under such a provision the federal Supreme Court has recently held that the cashier of a suspended bank was not to be considered as having retired from the service of the bank when the bank examiner took possession of it, so long as he continued to render any service in connection with the affairs of the bank. As a consequence, the surety company which had bonded the cashier was required to make good a defalcation by that officer discovered more than six months after the bank suspended business.⁸²

In many fidelity bonds there is incorporated an additional condition limiting the liability of the insurer for embezzlements or other acts of dishonesty by the employe to such as shall be discovered within some specified time after their commission.⁸³

Subrogation.

Policies of guaranty insurance usually contain an express stipulation subrogating the insurer to all rights of the insured by which he

⁸⁰ See, for example, *Reed v. Casualty Co.*, 189 Pa. 596, 42 Atl. 294.

⁸¹ *In re Citizens' Ins. Co.*, 16 U. C. Law J. 334.

⁸² *American Surety Co. v. Pauly*, 170 U. S. 144, 18 Sup. Ct. 552, 42 L. Ed. 977.

⁸³ For an example of such a limitation, see *Fidelity & Casualty Co. v. Bank*, 71 Fed. 116, 17 C. C. A. 641.

might make good his loss against the defaulting employe,⁸⁴ but apart from contract the guaranty insurer is entitled to such subrogation under a settled principle of the law of suretyship.⁸⁵ The contract also usually provides that the insured shall, in case of a default for which the insurer is liable, render to the insurer all aid in his power in procuring the defaulter's arrest and conviction.

CREDIT INSURANCE.

251. Credit insurance is a contract whereby the insurer promises, in consideration of a premium paid, and subject to specified conditions as to the persons to whom credit is to be extended, to indemnify the insured, wholly or in part, against loss that may result from the insolvency of persons to whom he may extend credit within the term of the insurance.

This kind of insurance, like guaranty insurance, to which it is closely related, strikingly analogous to suretyship, has been recognized as legal and proper. As was said by the Wisconsin court in *Shakman v. United States Credit System Co.*:⁸⁶ "The peril of loss by the insolvency of customers is just as definite and real a peril to a merchant or manufacturer as the peril of loss by accident, fire, lightning, or tornado, and is, in fact, much more frequent. No reason is perceived why a contract of indemnification against this ever-present peril is not just as legitimately a contract of insurance as a contract which indemnifies against the more familiar, but less frequent, peril by fire." But however great may be the need of such insurance to the merchant and manufacturer, it is manifest that the very nature of the risk renders the business most hazardous to the insurer. Not only are the elements that go to make up the risk numerous, and so uncertain as to defy accurate calculation, but there is also lacking that guide so necessary to the safe conduct of any insurance business, an extensive experience, since credit insurance is of very recent origin, especially in the United States.⁸⁷ We are therefore not surprised to

⁸⁴ A stipulation that the voucher or other evidence of payment by the guaranty company to the employer shall be conclusive of the liability of the employe to the guaranty company has been held invalid as contrary to public policy. *FIDELITY & CASUALTY CO. v. EICKHOFF*, 63 Minn. 170, 65 N. W. 351, 30 L. R. A. 586, 56 Am. St. Rep. 464.

⁸⁵ *FIDELITY & CASUALTY CO. v. EICKHOFF*, 63 Minn. 170, 65 N. W. 351, 30 L. R. A. 586, 56 Am. St. Rep. 464; *London Guaranty & Accident Co. v. Geddes* (C. C.) 22 Fed. 639.

⁸⁶ 92 Wis. 366, 66 N. W. 528, 32 L. R. A. 383, 53 Am. St. Rep. 920.

⁸⁷ "Insurance against mercantile losses is a new branch of the business of underwriting, and but few cases dealing with policies of that character have as yet found their way into the courts. The necessarily nice adjustments of the respective portions of loss to be borne by insurer and insured, the some-

find, among the few cases involving this kind of insurance that appear in our reports, records of frequent failures among such insurers.³⁹ The business appears to be increasing, however, and, with the aid of experience and a better understanding of commercial conditions, credit insurance may become a very useful branch of the underwriter's business.

The business being still in a formative state, it is natural that credit insurance contracts should vary greatly in form and in terms. Some of these contracts assume the form of a conditional sale of uncollectible debts,⁴⁰ while others directly promise indemnity for loss through insolvency of debtors made ascertainable under the terms of the agreement.⁴¹ So such contracts may be made by mutual as well as by stock companies.⁴² But however made, they are all equally contracts of insurance.⁴³ It is clear that the insurer could not attempt to insure a trader against all loss by bad debts. Under such insurance the readiness with which ambitious merchants extend credit under ordinary conditions, would become recklessness. Consequently it becomes the first care of the insurer to limit his responsibility to those debts incurred by men who are accustomed to paying their debts, and who are thought to be able to pay within the limits of the credit given. The insurer thus hopes to limit the risk assumed to that of business misfortune and insolvency overtaking some among this select class of debtors, such a risk being deemed susceptible of estimation, if not of calculation. The basis of this selection of persons to receive credit is furnished by the reports of one of the great mercantile agencies. That is, the insurance extends only to credit sales made to persons having a specified rating on the books of Bradstreet's or of Dun's agency, as the case may be. Insurance limited to debtors rated in one of these agencies will not, of course, cover losses by reason of debtors rated in the other only; but where a general agent of the insurer indorsed upon a policy, covering only Dun's rating, permis-

what intricate provisions which are required in order to make such business successful, and the lack of experience in formulating the stipulations to be entered into by both the parties to such a contract, have naturally tended to make the forms of policies crude and difficult of interpretation." *Tebbets v. Guarantee Co.*, 73 Fed. 95, 19 C. C. A. 281.

³⁹ An assignment by the insurer constitutes a breach of contract with the insured, which releases the latter from his contract obligation to make proofs of loss within a given period after the expiration of his policy. *Smith v. Insurance Co.*, 65 Minn. 283, 68 N. W. 28, 33 L. R. A. 511.

⁴⁰ See, for example, *Shakman v. Credit System Co.*, 92 Wis. 366, 66 N. W. 528, 32 L. R. A. 383, 53 Am. St. Rep. 920.

⁴¹ *Mercantile Credit Guarantee Co. v. Wood*, 68 Fed. 529, 15 C. C. A. 563.

⁴² See *Solvency Mut. Guarantee Co. v. York*, 3 Hen. & N. 588.

⁴³ *Claffin v. Credit System Co.*, 165 Mass. 501, 43 N. E. 293, 52 Am. St. Rep. 528, in which a credit insurance contract was held void for noncompliance by the company with the insurance laws of the state.

sion to the insured to sell, under the protection of the insurance, to persons not rated in Dun's, provided they were properly rated in Bradstreet's, it was held to be binding on the insurer.⁴⁴ Further, it was held that under the policy in suit the insurance covered a loss due to the insolvency of a purchaser to whom a fair credit, but no capital rating, was given in Dun's agency, while both capital and credit were rated as satisfactory in Bradstreet's. The court considered that the debtor in question was not rated in Dun's, within the system of the insurer, so that the insured was entitled to have recourse to Bradstreet's.⁴⁵

The policy also usually limits the amount of credit to be extended to any purchaser to some percentage of his capital as recorded on the books of the designated mercantile agency. But it has been held that giving credit in excess of the agreed percentage does not exclude the entire debt, but only that part in excess of the stipulated limit.⁴⁶ Considering the purpose of such a condition, this decision seems unfortunate. The efforts of an overburdened debtor to meet his obligations are not apt to be so strenuous as are those of the debtor who carries his burden easily. In order still further to stimulate the insured to carefulness in deciding when credit shall be given, the credit policy usually provides that the insured shall be co-insurer, and himself bear a certain initial amount of loss, only losses in excess of that amount falling upon the insurer.⁴⁷

Loss by Insolvency of Debtors.

When the policy provides for indemnity for loss sustained by the insolvency of debtors, it is held that the term "insolvency" is to be interpreted in its usual sense. No adjudication of bankruptcy is necessary, nor need the debtor's assets be less than his liabilities; he is insolvent when he is no longer able to meet his obligations as they fall due in the ordinary course of business.⁴⁸ Therefore a debtor who has made a general assignment for the benefit of his creditors is insolvent within the meaning of such a policy.⁴⁹ Of course the form of the assignment, whether statutory or common-law, whether for the benefit

⁴⁴ *Shakman v. Credit System Co.*, 92 Wis. 366, 66 N. W. 528, 32 L. R. A. 383, 53 Am. St. Rep. 920. See, also, *Robertson v. Credit System Co.*, 57 N. J. Law, 12, 29 Atl. 421.

⁴⁵ *Shakman v. Credit System Co.*, *supra*.

⁴⁶ *Shakman v. Credit System Co.*, *supra*.

⁴⁷ See *Strouse v. Indemnity Co.*, 91 Md. 244, 259, 46 Atl. 328, 1063; *Smith v. Insurance Co.*, 65 Minn. 283, 68 N. W. 28, 33 L. R. A. 511. An interesting discussion of such a provision is found in *Mercantile Credit Guarantee Co. v. Wood*, 68 Fed. 529, 15 C. C. A. 563.

⁴⁸ *Strouse v. Indemnity Co.*, 91 Md. 244, 46 Atl. 328.

⁴⁹ But not when the assignment is only partial. *Goodman v. Guarantee Co.*, 17 App. Div. 474, 45 N. Y. Supp. 508.

of all his creditors equally or preferring certain ones of them, is immaterial. It is sufficient if the debtor is deprived of the use of his property so as to be unable to pay his debts as they fall due.⁴⁰

EMPLOYERS' LIABILITY INSURANCE.

252. Under the general term "employers' liability insurance" is included insurance against—
- (a) Liability incurred because of personal injury sustained by employés of the insured, and
 - (b) Liability imposed upon the insured by the negligence of employés in causing personal injury to third persons.
253. THE LIABILITY OF THE INSURER accrues differently under the terms of differing contracts.
- (a) When the contract is for insurance against "liability" for personal injuries, the insurer may be required to pay upon the determination of the insured's liability by judgment or settlement, irrespective of actual payment by the insured.
 - (b) When the promise of the insurer is to indemnify the insured for loss actually sustained and paid on account of such personal injuries, the insurer is not liable under the policy until the liability of the insured to the injured person has been actually discharged.
 - (c) The insurer is also liable, under the terms of the usual policy, to indemnify the insured for expenses incurred in defending actions brought on account of such personal injuries as are covered by the policy.

In a former generation persons exposed to danger of accidental injury secured accident insurance for their own protection. In latter days, however, it is the employer or the railway carrier who needs the protection of insurance, while the injured individual relies upon the verdict of a sympathetic jury to indemnify him, not only for his bodily sufferings, but also for his mental anguish. Partly on account of the pernicious activity of the legal ghoul ordinarily termed the "ambulance chaser," the numerous suits that are now brought for personal injuries, and the appalling verdicts that are sometimes rendered and sustained, present a new and very real danger to the success of any enterprise requiring the employment of many men. This new and formidable risk has given rise to a new and extensive branch of insurance for assuming it. Employers' liability insurance, thus originating within the last twenty years, has already become, perhaps, the most important of the special insurances discussed in this chapter.

This kind of insurance would more accurately be called "liability insurance," for it embraces not only insurances against the employer's liability for injury suffered by his employé, but also those that in-

⁴⁰ *People v. Guarantee Co.*, 166 N. Y. 416, 60 N. E. 24.

demnify public carriers for losses incurred through injuries to passengers or strangers, or protect, in similar manner, other persons engaged in extensive business of such a character that they are subject to the risk of incurring liability for injuries to third persons not employés. But insurance against the employer's liability to his injured employé is so much the more important that it has given the whole group of related contracts a name that is now fixed in insurance parlance.

Liability Insurance not Contrary to Public Policy.

It has been contended that since public policy requires the exercise of the highest degree of diligence by masters to protect their servants from injury, and especially of public carriers in carrying their passengers safely, it is contrary to that policy to allow these persons to shift the responsibility for their negligence upon an insurance corporation, thus indirectly exempting themselves from a liability which the law will not allow them to avoid directly by contract. But the courts have declined to press the rule of public policy so far, holding without dissent that, since these contracts of liability insurance do not in any wise exempt the tortious insured from liability directly to the person injured, it is not a matter of proper concern to the public that the employer or carrier makes a collateral contract for indemnity.⁵⁰ Indeed, the value of employers' liability insurance is now expressly recognized in some states by statutes authorizing employers to take out insurance for the benefit of their employés.⁵¹ There can be no doubt but that employers' liability insurances are supported by a proper insurable interest.⁵²

The Liability of the Insurer.

Of course no claim can be enforced against the liability insurer unless it can be brought within the terms of the policy issued, and these are found to vary greatly. Some companies insure against any liability for personal injury which the insured may incur under any circumstances whatever;⁵³ others against liability for injury to employés only;⁵⁴ and still others against liability so incurred to all but employés. Again, nearly all policies granting this kind of insurance

⁵⁰ *Trenton Pass. Ry. Co. v. Guarantor's, etc., Co.*, 60 N. J. Law, 246, 37 Atl. 609, 44 L. R. A. 213; *American Casualty Co.'s Case*, 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97; *Kansas City, M. & B. R. Co. v. News Co.*, 151 Mo. 373, 52 S. W. 205, 45 L. R. A. 380, 74 Am. St. Rep. 545. See, also, *California Ins. Co. v. Compress Co.*, 133 U. S. 387, 10 Sup. Ct. 365, 33 L. Ed. 730.

⁵¹ *New York St. 1892*, c. 690, § 55.

⁵² See *EMPLOYERS' LIABILITY ASSUR. CORP. v. MERRILL*, 155 Mass. 404, 29 N. E. 529.

⁵³ *Bain v. Atkins*, 181 Mass. 240, 63 N. E. 414, 57 L. R. A. 791, 92 Am. St. Rep. 411.

⁵⁴ *Frye v. Electric Co.*, 97 Me. 241, 54 Atl. 395, 59 L. R. A. 444, 94 Am. St. Rep. 500.

fall into two classes, according as they are, by their terms, "liability" policies or "indemnity" policies.

"Liability" and "Indemnity" Policies.

When the agreement of the insurer is to pay "all damages with which the insured may be legally charged, or be required to pay, or for which he may become legally liable," it is clear that the insurer can be required to pay as soon as the liability of the insured becomes legally determined.⁵⁵ He is not concerned with the question whether the insured has paid or can pay the judgment entered against him. And the amount of the liability, when so fixed, determines the measure of the insurer's liability to pay, provided, of course, it does not exceed the sum written in the policy. Thus, in an Arkansas case,⁵⁶ a certain young woman had secured a judgment for \$1,200 for personal injury against a street railway company, which had liability insurance containing a term similar to that quoted above. The railway company was insolvent and wholly unable to pay the judgment, but the receiver nevertheless demanded of the insurer payment of the amount of the judgment. This demand was contested by the insurer on the ground that an insurance contract could only be for indemnity, and that, since the insolvent insured had not been damnified by the judgment in question, it ought not ask to be indemnified. But the court held the insurer liable for the full amount of the judgment, thus clearly stating its reasons for so doing: "This is not simply a contract of indemnity. It is more. It is also a contract to pay liabilities. The difference between a contract of indemnity and one to pay legal liabilities is: Upon the former an action cannot be brought, and a recovery had, until the liability is discharged; whereas, upon the latter, the cause of action is complete when the liability attaches. * * * The measure of damages is the amount of the accrued liabilities."

In *Frye v. Bath Gas & Electric Co.*⁵⁷ the insurer had contracted to indemnify the insured "for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue." A judgment for a large amount was recovered against the insured employer for personal injuries that came within the terms of the insurer's policy. The insured, however, had become insolvent, and an execution issued against it was returned unsatisfied. The plaintiff then filed his bill against the insured, its assignees, the insurer, and other parties in in-

⁵⁵ *American Employers' Liability Ins. Co. v. Fordyce*, 62 Ark. 562, 36 S. W. 1051, 54 Am. St. Rep. 305; *Anoka Lumber Co. v. Casualty Co.*, 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689; *Hoven v. Assurance Corp.*, 93 Wis. 201, 67 N. W. 46, 32 L. R. A. 388; *Bain v. Atkins*, 181 Mass. 240, 63 N. E. 414, 57 L. R. A. 791, 92 Am. St. Rep. 411; *Seeberger v. Wyman*, 108 Iowa, 527, 79 N. W. 290.

⁵⁶ *American Employers' Liability Ins. Co. v. Fordyce*, 62 Ark. 562, 36 S. W. 1051, 54 Am. St. Rep. 305.

⁵⁷ 97 Me. 241, 54 Atl. 395, 59 L. R. A. 444, 94 Am. St. Rep. 500.

terest, praying that the insurer should be compelled to pay in satisfaction of his judgment the amount due under the employer's liability policy. But the court held, aside from the question whether the plaintiff had any rights in the premises, that no payment was due under the insurer's contract until the insured had sustained some actual loss by making actual payment under the judgment. But as the insured was wholly unable ever to discharge its liability to the plaintiff, the insurer had incurred no liability whatever. "There can be no reimbursement," said the court, "where there has been no loss. The contract of insurance contains nothing to show that it was the object or intention of the contracting parties that the insurer should guaranty the gas company's liability for negligence to its employes. It was not a contract of insurance against liability, but of indemnity against loss by reason of liability." ⁵⁸ In a recent New Jersey case ⁵⁹ the court, construing a provision identical with that in the case just discussed, held that, while "not the amount of the employe's judgment, but the amount paid by the employer thereon, was the sum for which the insurer was responsible," yet a transfer of the employer's property to a trustee in bankruptcy was a sufficient payment to satisfy the terms of the policy and perfect the liability of the insurer. Only such a proportion of the judgment was held to be paid, however, as corresponded to the percentage of all the assets of the insolvent, excluding the insurance claim, to all of its debts, excluding this judgment. Such an amount the insurer was required to pay to the receiver for the use of the complainant.

Insurer Liable for Expenses of Defense.

The insurer agrees to indemnify the insured only for liabilities legally ascertained. Therefore it is the duty of the insured to resist claims made against him for personal injuries, and to give due notice to the insurer of the pendency of any action brought, so that the latter may take steps to defend the action.⁶⁰ In order to secure prompt notice of a possible claim against him, the insurer by contract usually stipulates for "immediate" notice of any injury that may give rise to liability. As we have seen, notice is deemed "immediate," under the requirements of this provision, when it is given with such promptness as is reasonable under all the circumstances of the case.⁶¹ If, after agreeing that the insurer shall have control of all litigation, the insured settles the claim without the knowledge and consent of the in-

⁵⁸ See, to the same effect, *Cushman v. Fuel Co. (Iowa)* 98 N. W. 509.

⁵⁹ *Travelers' Ins. Co. v. Moses*, 63 N. J. Eq. 260, 49 Atl. 720, 92 Am. St. Rep. 663.

⁶⁰ *Glens Falls Portland Cement Co. v. Insurance Co.*, 162 N. Y. 399, 56 N. E. 897.

⁶¹ See cases cited in note 14. *supra*.

suror, the latter is released from any liability under the policy.⁶³ But if the insurer had proper notice of the pending action, the failure of the insured to send the summons served on him, or a copy thereof, will not, in the absence of stipulation to that effect, release the insurer.⁶³

If, after due notice to the insurer, he fails to defend the pending action, it is the duty of the insured then to make a bona fide defense, the expenses of which, as well as the amount of the judgment entered, will become chargeable to the insurer.⁶⁴ And the judgment in such an action, over which the insurer might have exercised complete control, is conclusive evidence against him as to the liability of the insured which he has agreed to indemnify.⁶⁵ Likewise the insurer, not defending after due notice, will be bound by a judgment entered against the insured by consent as the result of a bona fide compromise. In that event, however, the judgment is only prima facie evidence of the amount of the insured's liability.⁶⁶

But a judgment for personal injury against one partner only of a firm will not render an insurer liable under a policy promising indemnity to the firm for liability for such damages.⁶⁷

RIGHTS OF THE INJURED PERSON IN THE INSURANCE FUND.

254. The fund payable under a liability policy is not subject to any trust in favor of the person whose right to damages for personal injury gave rise to the insurer's liability, nor has such third person any other right in connection with the insurance, save the common right of reaching the fund, when payable, by garnishment or other proper process.

The contract between the employer and the insurer against liability is solely for the benefit of the employer. The injured employé, whose just claim may fix the liability of the insurer, is no party to the insurance contract, nor has he any rights, legal or equitable, growing

⁶³ Pickett v. Casualty Co., 60 S. C. 477, 38 S. E. 160, 629.

⁶⁴ Ward v. Casualty Co., 71 N. H. 262, 51 Atl. 900, 93 Am. St. Rep. 514.

⁶⁵ Mott v. Hicks, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550; Curtis v. Banker, 136 Mass. 355; Howard v. Lovegrove, L. R. 6 Exch. 43. It has been held that, under a contract obligating the insured to permit the insurer to control all claims and actions brought against the insured for injuries, the insurer was not liable for the expenses incurred by the insured in defending a groundless action. Cornell v. Insurance Co., 175 N. Y. 239, 87 N. E. 578. But see, to the contrary, Chilson v. Downer, 27 Vt. 536; also the dissenting opinion of Cullen, J., in Cornell v. Insurance Co., supra.

⁶⁶ City of St. Joseph v. Railway Co., 116 Mo. 636, 22 S. W. 794, 38 Am. St. Rep. 626.

⁶⁷ Kansas City, M. & B. R. Co. v. News Co., 151 Mo. 373, 52 S. W. 205, 45 L. R. A. 380, 74 Am. St. Rep. 545; Conner v. Reeves, 103 N. Y. 527, 9 N. E. 439.

⁶⁸ Kelley v. Accident Co., 97 Mo. App. 623, 71 S. W. 711.

out of it.⁶⁸ Of course, the injured employé might be made the beneficiary under the contract by the insurer's promising the insured to discharge any judgment or other legally ascertained claim for personal injury by paying the amount of such claim to the owner of it. Under such a contract the injured person could, in most jurisdictions, recover from the insurer by an action brought directly on the policy. But such contracts are rarely, if ever, made, although they are expressly authorized by statute in New York.⁶⁹

The consequence of this doctrine is that a judgment recovered for personal injury against an insolvent employer may enable him to recover the full amount of it against the insurer who has contracted to indemnify him against liability, while the judgment may be wholly worthless in the hands of the injured person or his representative. It follows, therefore, that the insurer may, without notice to the injured person, make a settlement with the insured, either before judgment against the latter, or after it, and be wholly discharged of his liability on the insurance contract.⁷⁰ Likewise the injured person having a claim against an insolvent employer has absolutely no rights against an insurer who has contracted to indemnify the employer for loss sustained by actual payment of damages for personal injury, even when a statute allows contracts to be enforced by the person in interest.⁷¹

Of course, the injured person or his representative, like any other judgment creditor, can by garnishment or attachment reach any fund in the hands of an insurer that may be due and payable to the judgment debtor.⁷²

⁶⁸ Frye v. Bath Gas & Electric Co., 97 Me. 241, 54 Atl. 395, 59 L. R. A. 444, 94 Am. St. Rep. 500; Bain v. Atkins, 181 Mass. 240, 63 N. E. 414, 57 L. R. A. 791, 92 Am. St. Rep. 411; Travelers' Ins. Co. v. Moses, 63 N. J. Eq. 260, 49 Atl. 720, 92 Am. St. Rep. 663; Cushman v. Fuel Co. (Iowa) 98 N. W. 509; Embler v. Insurance Co., 158 N. Y. 431, 53 N. E. 212, 44 L. R. A. 512.

⁶⁹ St. 1892, c. 690, § 55. For two interesting cases discussing the rights of the injured person in contracts of liability insurance, see Travelers' Ins. Co. v. Moses, 63 N. J. Eq. 260, 49 Atl. 720, 92 Am. St. Rep. 663, and Embler v. Insurance Co., 158 N. Y. 431, 53 N. E. 212, 44 L. R. A. 512.

⁷⁰ Bain v. Atkins, 181 Mass. 240, 63 N. E. 414, 57 L. R. A. 791, 92 Am. St. Rep. 411.

⁷¹ See Cushman v. Fuel Co. (Iowa) 98 N. W. 509.

⁷² Anoka Lumber Co. v. Fidelity Co., 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689.

APPENDIX.

NEW YORK STANDARD FIRE POLICY.¹

[References are to pages of the text in which the corresponding provisions of the standard policy are construed or considered.]

THE INSURANCE COMPANY, in consideration of the stipulations herein named and of dollars premium,² does insure for the term ³ of from the day of, at noon, to the day of, at noon, against all direct loss or damage by fire,⁴ except as hereinafter provided, to an amount not exceeding ⁵ dollars, to the following described property ⁶ while located and contained as described herein, and not elsewhere,⁷ to wit:
.....

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality;⁸ said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value,⁹ and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do;¹⁰ but there can be no abandonment to this company of the property described.

This entire policy shall be void ¹¹ if the insured has concealed or

¹ In full, cc. 12, 13, pp. 429-510.

² 34, 175 et seq.

³ 435.

⁴ 475.

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⁵ 489.

⁶ 115, note 74, 436.

⁷ 439.

⁸ 483.

⁹ 488.

¹⁰ 488.

¹¹ 433.

misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof;¹² or if the interest of the insured in the property be not truly stated herein;¹³ or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.¹⁴

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy;¹⁵ or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days;¹⁶ or if the hazard be increased by any means within the control or knowledge of the insured;¹⁷ or if mechanics be employed in building, altering, or repairing the within described premises for more than fifteen days at any one time;¹⁸ or if the interest of the insured be other than unconditional and sole ownership;¹⁹ or if the subject of insurance be a building on ground not owned by the insured in fee-simple;²⁰ or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage;²¹ or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed;²² or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise;²³ or if this policy be assigned before a loss;²⁴ or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein;²⁵ or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard, (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light);²⁶ or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.²⁷

¹² 250 et seq.

¹³ 442.

¹⁴ 454.

¹⁵ 457.

¹⁶ 460.

¹⁷ 462.

¹⁸ 464.

¹⁹ 444.

²⁰ 448.

²¹ 447.

²² 468.

²³ 449.

²⁴ 468.

²⁵ 469.

²⁶ 462.

²⁷ 471.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.²⁸

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.²⁹

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs;³⁰ nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings,³¹ or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.³²

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.³³

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days notice of such cancelation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.³⁴

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation

²⁸ 478.

²⁹ 474.

³⁰ 482.

³¹ 484.

³² 183, 492.

³³ 493.

³⁴ 494.

having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.³⁵

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.³⁶

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged;³⁷ and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.³⁸

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described,

³⁵ 420, note 106.

³⁶ 441.

³⁷ 496.

³⁸ 505.

and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.³⁹

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.⁴⁰

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for;⁴¹ and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto.⁴² Liability for re-insurance shall be as specifically agreed hereon.⁴³

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.⁴⁴

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements,⁴⁵ nor unless commenced within twelve months next after the fire.⁴⁶

³⁹ 455.
⁴⁰ 486.

⁴¹ 380, 493.
⁴² 54, 485.

⁴³ 61 et seq.
⁴⁴ 422, 426.

⁴⁵ 502.

⁴⁶ 507.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.⁴⁷

In witness whereof, this company has executed and attested these presents this day of, 19.....

This policy shall not be valid until countersigned by the duly authorized manager or agent of the company at

⁴⁷ 827, 492.

A FORM OF POLICY OF MARINE INSURANCE UPON CARGO.

THE INSURANCE COMPANY,, on account of, in case of loss to be paid in funds current in the United States, or in the city of New York, to, do make insurance, and cause to be insured, lost or not lost, at and from, upon, laden or to be laden on board the good ship, whereof is master for this present voyage, or whoever else shall go for master in said vessel, or by whatever other name or names the said vessel, or the master thereof, is or shall be named or called.

Beginning the adventure upon the said goods and merchandises from and immediately following the loading thereof on board of the said vessel, at as aforesaid, and so shall continue and endure until the said goods and merchandises shall be safely landed at as aforesaid. And it shall and may be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at, any ports or places, if thereunto obliged by stress of weather, or other unavoidable accident, without prejudice to this insurance. The said goods and merchandises, hereby insured, are valued (premium included) at dollars.

Touching the adventures and perils which the said Insurance Company is contented to bear, and takes upon itself in this voyage, they are of the seas, men of war, fires, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, reprisals, takings at sea, arrests, restraints, detentions of all kings, princes, or people, of what nation, condition, or quality soever, barratry of the master and mariners, and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, or any part thereof. And, in case of any loss or misfortune, it shall be lawful and necessary to and for the assured, his factors, servants, and assigns, to sue, labor, and travel for, in, and about the defense, safeguard, and recovery of the said goods and merchandises, or any part thereof, without prejudice to this insurance; nor shall the acts of the insured or insurers in saving, recovering, and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment; to the charges whereof the said insurance company will contribute according to the rate and quantity of the sum herein insured; having been paid the consideration for this insurance, by the assured or his assigns, at and after the rate of per cent.

And in case of loss, such loss to be paid in thirty days after proof of loss, and proof of interest in the said (the amount of the note given for the premium, if unpaid, being first deducted), but no

partial loss or particular average shall in any case be paid, unless amounting to five per cent. Provided always, and it is hereby further agreed, that if the said assured shall have made any other assurance upon the premises aforesaid, prior in day of date to this policy, then the said Insurance Company shall be answerable only for so much as the amount of such prior assurance may be deficient towards fully covering the premises hereby assured; and the said Insurance Company shall return premium upon so much of the sum by them assured as they shall be by such prior assurance exonerated from. And in case of any assurance upon the said premises, subsequent in day of date to this policy, the said Insurance Company shall nevertheless be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent assurance had been made. Other assurance upon the premises aforesaid, of date the same day as this policy, shall be deemed simultaneous herewith; and the said Insurance Company shall not be liable for more than a ratable contribution in the proportion of the sum by them insured to the aggregate of such simultaneous insurance. It is also agreed that the property be warranted by the assured free from any charge, damage, or loss which may arise in consequence of a seizure or detention, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war.

Warranted not to abandon, in case of capture, seizure, or detention, until after condemnation of the property insured; nor until ninety days after notice of said condemnation is given to this company. Also warranted not to abandon in case of blockade, and free from any expense in consequence of capture, seizure, detention, or blockade, but in the event of blockade to be at liberty to proceed to an open port, and there end the voyage.

In Witness Whereof the president or vice president of the said Insurance Company hath hereunto subscribed his name, and the sum insured, and caused the same to be attested by their secretary, in, the day of, 19....

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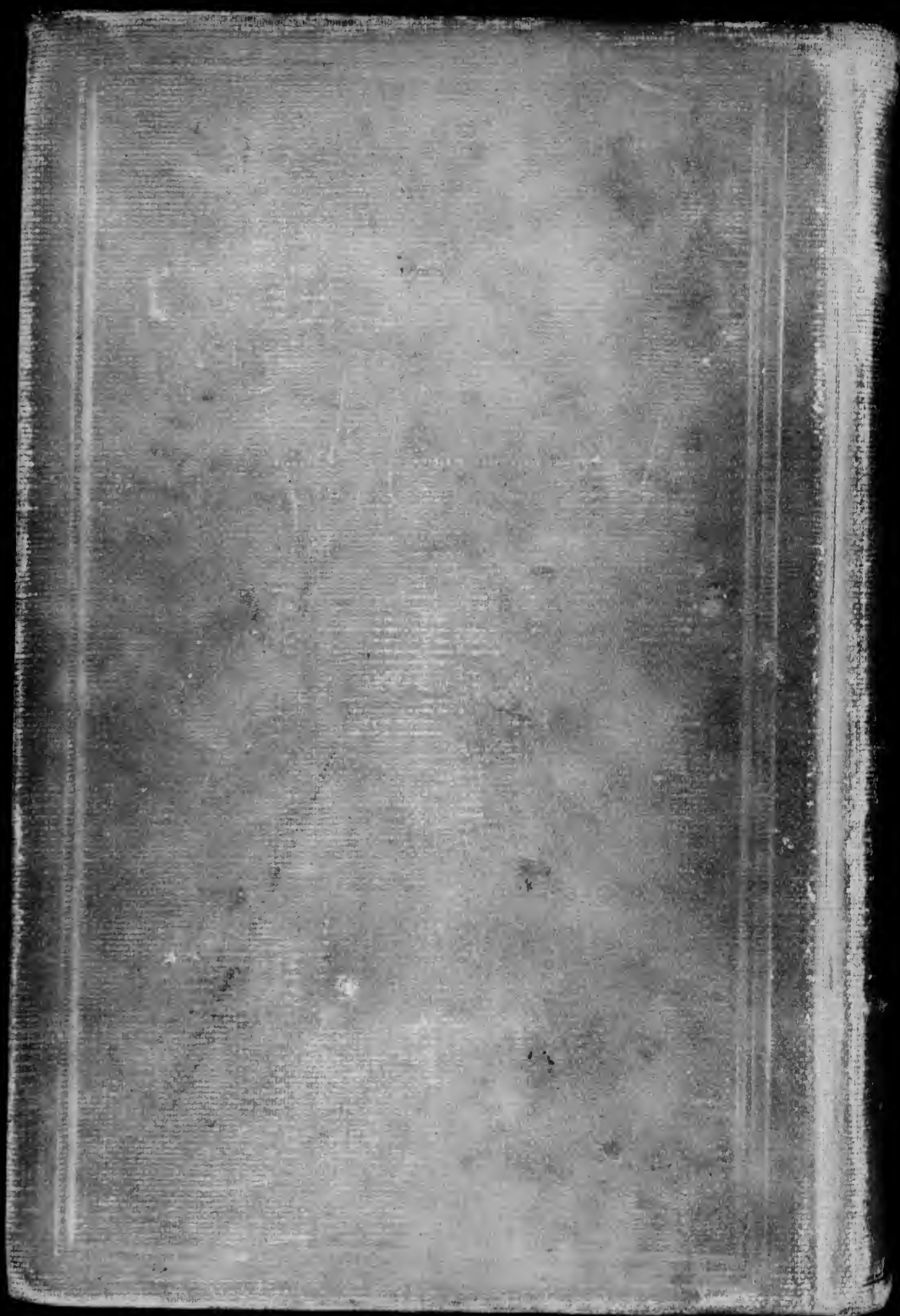
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